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SUBJECT INDEX

AUTHORITIES CITED

CASES:

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 41

LESLIE IRVIN,

Petitioner,

vs.

A. F. DOWD, Warden, Indiana State Prison, Michigan City, Indiana,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

PETITIONER'S BRIEF

Opinions Below

The opinion of the United States Circuit Court of Appeals for the Seventh Circuit is reported in 271 F. 2d, p. 552 (7th Cir. 1959) the cause having been remanded by this Court at 359 U.S. 94, 79 S. Ct. 825, 3 L. Ed. 2d 909, with instructions to decide Petitioner-Appellant's cause on the merits, or remand same to the District Court for further consideration. On October 21, 1959, the United States Court of Appeals for the Seventh Circuit issued an order retaining jurisdiction (Tr. p. 38), and thereafter on October 23, 1959 decided the within cause on the merits adversely to this Petitioner (Tr. p. 39). Petition for a rehearing was denied on November 12, 1959 without written opinion (Tr. p. 54).

The opinion of the United States District Court for the Northern District of Indiana, South Bend Division, from which the original appeal was taken is reported in 153 F. Supp. 531.

Jurisdiction

The judgment of the United States Court of Appeals for the Seventh Circuit was entered October 23, 1959 (Tr. p. 54). Petition for rehearing was denied on the 12th day of November, 1959 (Tr. pp. 54-55). The jurisdiction of this Court was invoked under the provisions of 28 U.S.C., Sec. 1254(1).

The writ of certiorari was granted by this Court to the United States Court of Appeals for the Seventh Circuit on the 23rd day of February, 1960 (Tr. p. 55).

Questions Presented

I.

Whether Petitioner was denied a fair and impartial trial as contemplated by the due process clause of the Fourteenth Amendment to the Constitution of the United States by being tried before a jury wherein more than half of the jury testified under oath on the voir dire examination that they had a preconceived opinion that the defendant was guilty of the crime charged, and it would require evidence to remove that opinion.

II.

Whether due process of law as contemplated by the Fourteenth Amendment to the Constitution of the United States was denied Petitioner by the trial court's refusal to consider on the merits a second change of venue based

upon bias, prejudice and excitement existing in the county wherein Petitioner was tried, for the sole reason that Petitioner had previously been granted a change of venue from another county, and the granting of the second change of venue would be in conflict with Burns Indiana Statutes Annotated, 1956 Replacement, Vol. 4, Part 1, Sec. 9-1305, p. 157.

III.

Whether Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States by the trial court's action in denying a hearing on Petitioner's verified motions and affidavits for change of venue from the county wherein Petitioner was tried, based upon bias, prejudice and excitement then existing in the county, against the Petitioner.

IV.

Whether Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States in the overruling of motions for continuance of the trial, where bias, prejudice and excitement existed in the community and county at the time of said trial against Petitioner, as evidenced by newspaper articles, radio broadcasts, and the voir dire examination of prospective jurors.

V.

Whether Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, by the trial court's action in denying a hearing on Petitioner's verified motions for continuance, based upon the bias, prejudice and excitement existing at the time of trial in the community and county, against this Petitioner.

VI.

Whether due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States was violated in permitting the introduction of a purported confession over Petitioner's objection, and without giving Petitioner an opportunity to introduce evidence, including his own testimony, in support of his objection and offer to prove the involuntary nature of same.

VII.

Whether Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States by the actions of the prosecuting attorney, who participated in the selection of the jury, questioning of witnesses, testified himself as a witness, and who was then permitted, over Petitioner's objection, to make a final argument to the jury concerning the evidence, including comments on his own testimony.

VIII.

Whether Petitioner was denied due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States, by being denied the right to introduce evidence in support of challenges to certain jurors because of their bias and prejudice against the Petitioner, which bias and prejudice Petitioner offered to prove.

Constitutional Provisions and Statutes Involved

The pertinent constitutional provision is as follows, to-wit:

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of

the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *Fourteenth Amendment of the Constitution of the United States.*

The pertinent statutory provision is as follows, to-wit:

"When affidavits for a change of venue are founded upon excitement or prejudice in the county against defendant, the court, * * * and in all cases punishable by death, shall grant a change of venue to the most convenient county * * * provided, however, that only one (1) change of venue from the judge and one (1) change from the county shall be granted." *Burns Indiana Statutes Annotated, 1956 Replacement, Section 9-1305, Vol. 4, Part 1, p. 157.*

Statement

Changes of Venue

That on the 29th day of October, 1955, petitioner filed a verified motion and affidavit for change of venue from Gibson County, Indiana, Circuit Court, and requested a hearing thereon. Said motion and affidavit is found in Transcript page 62 Vol. 1 Petitioner's Exhibit No. 1, and reads as follows, omitting the captional parts and signatures thereon:

"The defendant, being first duly sworn, upon his oath says that he is the defendant in the above entitled cause; that he cannot have a fair and impartial trial thereof in the County of Gibson, State of Indiana, for the following reason:

That he verily believes that he cannot receive a fair and impartial trial of said cause in the Gibson Circuit Court, Gibson County, Indiana, owing to the excitement and prejudice in said county against this defendant.

The defendant further states, shows and represents that owing to the general excitement and prejudice of the inhabitants of Gibson County, Indiana, against this defendant he cannot have a fair and impartial trial of this cause for the following reasons, all of which the defendant now offers to prove and demand a hearing on the same to prove:

1. That commencing on the 2nd day of December, 1954, and up to and including the 28th day of March, 1955, there were six unsolved murders in and around Vanderburgh County, State of Indiana, and Gibson County, Indiana; that commencing with the 3rd day of December, 1954, up to and including this date, newspapers of Vanderburgh County and Gibson County, Indiana, have been circulating and publishing news stories of said murders; that said series of murders were unsolved and these newspapers devoted a large percentage of their front page news to stories concerning said murders and the extensive manhunt that accompanied the actions of law enforcement officers in their search for said murderer or murderers; that the failure of said police officers to solve said crime was in fact selected as a top news story for the year '54-'55; that as a direct result of said extensive newspaper coverage of these murders the residents of Gibson County were highly and greatly aroused; that the inhabitants of Gibson County and Vanderburgh County, during the period of time which said murders were committed, were greatly aroused and in fear of their own lives.

2. That this defendant was arrested on the 8th day of April, 1955; that said newspapers carried press releases from the Evansville Police Department, in whose custody this defendant was then and there, concerning this defendant's connection with said six murders in Evansville and surrounding areas and that this affiant had confessed to the six murders in the Evansville area; that said press releases were given to the newspapers out of the presence of this defendant; that said releases were unsworn to and never seen by this defendant; that at no time was he or his counsel given the opportunity to cross-examine those who released such statements to the newspapers and radio stations in Evansville, Indiana; that at no time has this defendant been given the opportunity by the press to deny or contradict said press releases; that said press releases are untrue.

3. That the press release accusing this defendant of committing said murders was jointly given by the Prosecutor of Vanderburgh County, Indiana, and the Chief of Detectives of the City of Evansville, Indiana; that numerous other releases were given from time to time by the Prosecutor and Police Department stating that this defendant was attempting to make a deal with them to plead guilty for a sentence of life, rather than face trial and a possible penalty of death; that the Prosecutor announced to the public of Vanderburgh County and Gibson County, Indiana, that he would make no compromise and would ask the death penalty; that he had confessed to the commission of the six murders; that the details of said confession were released as a purported statement from this defendant to the members of the press and radio, when in fact this defendant made no such statement.

4. The defendant further states that the newspapers of Vanderburgh and Gibson Counties, Indiana, carried news items stating that this defendant had been found sane and was adjudged sane, whereas in truth and in fact, there had been no plea of insanity on the part of the defendant in this matter, nor has this defendant been found sane or insane by this court, or any other court.

5. That since the 13th day of April, 1955, these Evansville papers and the Gibson County newspapers have continuously carried stories concerning said defendant and referring to this defendant as the 'confessed killer of six,' and that said stories have been continuous up to and including this date.

6. That in addition, each time this defendant has gone to court said newspapers have carried front-page stories concerning the court room action; that the Evansville Courier printed a cartoon depicting a change of venue taken by this defendant in the Vanderburgh Circuit Court to the Gibson Circuit Court as taking the 'dirty wash' from Vanderburgh County to Gibson County; that another cartoon depicted the court room scene at the time of the hearing of defendant's motion to remand.

7. That said newspapers, the same being the Evansville Courier, Evansville Press, and the two daily newspapers of Gibson County, are delivered to approximately 95 percent of the dwelling units of Gibson County, Indiana; that said papers have carried stories and news items concerning this defendant and his responsibility for said murders.

8. That in addition thereto, the radio stations of Evansville, Indiana, carried extensive news broadcasts

and bulletins covering the same and similar material as released by the Evansville Courier and Evansville Press; that said radio stations have extensive and complete coverage of Gibson County, Indiana.

9. That because of said newspaper publications and radio coverage the inhabitants of Gibson County have become highly prejudiced and there is now excitement against this defendant among said inhabitants of Gibson County; that Gibson County is a small agricultural community, having a population of approximately thirty thousand people; that the trial of this cause in said Gibson County has become the talk and general conversation of the community; that radio curbstone opinions have been taken of the inhabitants of Gibson County, as to the guilt or innocence of this defendant and the punishment to be given or imposed; that the minds of the inhabitants of Gibson County and the people throughout the same are excited, biased and prejudiced against the defendant; that the press of said county has been engaged in publishing articles relative to this defendant which have been or are being read by the citizens generally of Gibson County, greatly tending to affect the minds of the citizens against this defendant; that by reason of the foregoing facts, all of which the defendant offers to prove to this court, it is impossible for this defendant to be given a fair and impartial trial in Gibson County; that to place this defendant on trial before the inhabitants of Gibson County would deny this defendant due process of law under the Fourteenth Amendment of the United States Constitution and of his constitutional rights under Article 1, Section 13, of the Constitution of the State of Indiana.

10. The defendant further alleges and says that attached hereto, incorporated herewith are Exhibits 1

to 46 inclusive; that same are some of the newspaper items that have been published by the newspapers of Vanderburgh County, Indiana, against this defendant, and distributed throughout Gibson County; that the same are highly prejudicial to this defendant's cause; that said newspaper items set out in said exhibits have been circulated generally through said Gibson County and to its said thirty thousand inhabitants.

WHEREFORE, the defendant prays a hearing to introduce evidence in support of his motion for change of venue from Gibson County, Indiana, and to further show to this Court that the newspaper and radio publicity given this cause has caused the Gibson County inhabitants to be excited and prejudiced against this defendant, and that this cause be venued to a county where no excitement and prejudice exists against this defendant and for all other necessary and proper relief in the premises."

Said motion and affidavit was denied without a hearing by the trial court. The Order Book Entry is found at page 57 of the Transcript, Vol. 1, Petitioner's Exhibit No. 1, which reads in part, as follows:

"And now the defendant files his motion and affidavit for change of venue from the county, and the court having judicial knowledge that this case is in this court on a change of venue from the Vanderburgh Circuit Court, granted on the petition of the defendant, all as shown by the transcript in this cause, now overrules said motion and affidavit for change of venue from Gibson County, Indiana, * * * "

That thereafter petitioner filed another change of venue from Gibson County, State of Indiana on the 14th day of

November, 1955, requesting a hearing thereon. Said motion and affidavit reading as follows, omitting the captional parts and signatures thereof and found in Petitioner's Exhibit No. 1, Vol. 1, page 148, to-wit:

"The defendant being first duly sworn upon his oath says, that he is the defendant in the above entitled cause; that he cannot have a fair and impartial trial thereof in the county of Gibson, State of Indiana, for the following reason:

That he verily believes that he cannot receive a fair and impartial trial of said cause in the Gibson Circuit Court, Gibson County, Indiana, owing to the excitement and prejudice in said county against this defendant.

WHEREFORE, the defendant demands a change of venue from the County of Gibson, State of Indiana, and demands a hearing upon same to prove that owing to the excitement and prejudice in said County against the defendant, said defendant cannot have a fair and impartial trial thereof in this County."

Order Book Entry denying hearing on said motion for change of venue reads as follows:

"* * * and comes now the defendant and files an affidavit and motion for change of venue from Gibson County, and the Court being duly advised in the premises overrules said affidavit and motion of said defendant, from Gibson County, since the defendant has had one change of venue from the county as allowed him by the statute of the State of Indiana, and that it is in this court on a change of venue from the Vanderburgh Circuit Court" (Tr. p. 127, L. 27 to Tr. p. 128, L. 24).

That thereafter Petitioner filed another change of venue from Gibson County, State of Indiana on the 7th day of December, 1955, requesting a hearing thereon. Said motion and affidavit reading as follows; omitting the captional parts and signatures thereof, and found in Petitioner's Exhibit No. 1, Vol. 1, page 297, to-wit:

"The defendant, Leslie Irvin, being duly sworn upon his oath says that he is the defendant in the above entitled cause; that he cannot have a fair and impartial trial thereof in the County of Gibson, State of Indiana, for the following reasons:

1.

That he verily believes that he cannot receive a fair and impartial trial of said cause in the Gibson Circuit Court, Gibson County, State of Indiana, owing to the excitement and prejudice in said county against this defendant, and further for the reason that the members of the jury as now constituted have expressed and formed an opinion to this court that the defendant is guilty of the crime charged, and that said jurors are biased and prejudiced against this defendant, and cannot give this defendant a fair and impartial trial as guarantee by the laws of the State of Indiana, the Constitution of the State of Indiana, and the Constitution of the United States.

2.

Defendant further states that in the voir dire examination of 355 jurors called in this case to qualify as jurors, 233 have expressed and formed their opinion as stated in said voir dire that the defendant is guilty; that said expressions by said members of the voir dire is a fair and reasonable representation of the citizens

of Gibson County expressing themselves that the defendant is guilty of the crime charged, and that they are biased and prejudiced against this defendant, and that they cannot give the defendant a fair and impartial trial, and they further stated on said voir dire that they could not be guided by the law and evidence in reaching a verdict, but would be influenced by their fixed opinions of guilt they now have against this defendant, and that said fixed opinions entertained by said members of the voir dire are based upon and as a result of intensive newspaper stories about this defendant.

3.

That the excitability and hostile nature of opinions of the citizens of Gibson County is further evidenced by exclamations that 'they ought to hang him'; said exclamations having been made by prospective jurors on the voir dire in this cause, and in the presence of the jurors now occupying the jury box.

WHEREFORE, the defendant demands a change of venue from Gibson County, State of Indiana, and requests and prays a hearing upon this motion and affidavit, and offers to prove the above and foregoing allegations to be true, and that owing to the excitement and prejudice in said county of Gibson against this defendant, said defendant cannot have a fair and impartial trial thereof in this county."

Order Book Entry overruling said motion (Tr. p. 284).

CONTINUANCES

That during the course of the trial, the petitioner filed verified motions and affidavits for continuances, and particularly on the 14th day of November, 1955, petitioner

filed a verified motion and affidavit for a continuance of the trial of his cause in the Gibson Circuit Court and requested a hearing on said continuance. Said Court denied said continuance and denied the petitioner a hearing on said continuance. That said motion and affidavit for continuance, omitting the captional parts and signatures thereof reads as follows, to-wit: And is found in Petitioner's Exhibit No. 1, Vol. 1, page 130:

"The defendant, Leslie Irvin, for his verified motion and affidavit for a continuance of this cause and for a hearing on this motion to continue, alleges and says:

1. That there is excitement and prejudice against this defendant in Gibson County, Indiana.

2. That the newspapers, radio and television stations of Vanderburgh County and Gibson County, Indiana, both having complete coverage and circulation of Gibson County, Indiana, have persisted in publishing false and untrue stories, false statements and accusations against this defendant, classifying, describing and charging him as the 'confessed killer of six persons'; that said newspapers and radio broadcasts and publications have continuously been printed since April, 1955, and these stories and radio broadcasts have been circulated and broadcast to the citizens of Gibson County, Indiana; that as a result of said radio broadcasts and newspaper publications the citizens of Gibson County, Indiana, are excited, prejudiced, biased and hostile toward this defendant.

3. That said newspaper publications and radio broadcasts are prejudicial to this defendant's rights to a fair and impartial trial; that it is impossible for this defendant to have a fair and impartial trial with

the present biased, prejudiced and hostile feeling against this defendant now existing in Gibson County, Indiana.

4. That attached hereto, marked Exhibits 1 to 7, are newspaper articles printed by the Evansville Courier and the Princeton Clarion-Democrat; that said newspapers have been extensively circulated in Gibson County, Indiana; that said newspapers reached approximately ninety-five (95) percent of the dwelling homes in said Gibson County, Indiana, that said newspaper articles have been distributed to the homes and dwelling units of the members of the jury panel called by the court for the trial of this cause; that said prospective jurors, consisting of a special venire of 201 inhabitants of Gibson County, Indiana, in addition to the 20 members of the regular panel, have read and discussed the stories printed in said newspapers set out in said exhibits; that said newspaper articles have prejudiced said prospective jurors' minds against this defendant; and that the attached exhibits are only some of the false and untrue statements that have been published about this defendant since April, 1955; that said newspapers have persistently published articles and stories concerning this defendant; that said stories are factual and are inflammatory, accusatory and condemning of this defendant; that said publications suggest that the defendant is guilty of the crime charged, as well as five other murders; that said newspapers have tried the case in the newspapers before the action has begun in the courts and as a result of their publication as facts, without any basis therefor, jurors called in this cause have determined that this defendant is guilty.

5. Deponent further states that exhibits numbered 1, 2 and 3 are newspaper articles that have appeared

in publications delivered within the last thirty-six hours to the inhabitants and prospective jurors of Gibson County, Indiana.

6. That to place this defendant on trial in Gibson County, Indiana, with said excitement, bias, prejudice and hostility now existing in Gibson County, Indiana, against this defendant, would deprive this defendant of his constitutional rights under Article 1, Section 12, of the Constitution of the State of Indiana, and under Article 1, Section 13, of the Constitution of the State of Indiana, and the 14th Amendment to the Constitution of the United States.

7. The defendant requests the court to take judicial knowledge of the exhibits and affidavit for change of venue heretofore filed in this cause. The defendant incorporates said newspaper articles, by reference, as a part of this affidavit and motion for a continuance.

WHEREFORE, the defendant prays for a continuance of this cause until such time as said bias, prejudice and hostile excitement is permitted to settle, or that this defendant be granted a change of venue from Gibson County, Indiana, to a county wherein bias and prejudice does not exist and the defendant further prays a hearing on this motion to introduce evidence in support thereof, and for all other necessary and proper relief in the premises."

Additional verified motions for continuances were filed on November 15, 1955, Tr. p. 155, Petitioner's Exhibit No. 1; on November 16, 1955, Tr. p. 162, Petitioner's Exhibit No. 1; on November 17, 1955, Tr. p. 171, Petitioner's Exhibit No. 1; on November 18, 1955, Tr. p. 179, Petitioner's Exhibit No. 1; on November 21, 1955, Tr. p. 187, Petitioner's Exhibit No. 1; on November 22, 1955, Tr. p. 201, Petitioner's Exhibit No. 1; on

December 5, 1955, Tr. p. 243, Petitioner's Exhibit No. 1; each of said motions were overruled as shown by the record in Transcript pages 127, 154, 161, 170, 178, 186, 200 and 242.

During the voir dire examination of jurors, Paul B. Wever, Prosecuting Attorney for the State of Indiana in this cause appeared on Radio Station WJPS in Evansville, Indiana, for an interview with an announcer of said station. This interview took place during the second week of the voir dire examination, and is found in Exhibit 1, Volume 1, Tr. pp. 253-254, and is part of a motion for continuance filed by Petitioner on December 5, 1955. The verbatim transcript of this broadcast reads as follows:

"We are going to talk for a couple of minutes with Mr. Paul Wever, who is conducting the prosecution against Leslie Irvin * * * who is charged with the murder of Wesley Kerr in the Gibson Circuit Court * * *

Ralph Smith: Mr. Wever, this has been a rather unusual case, in that it has taken quite a while to qualify a jury, is that right?

Paul Wever: Yes, very unusual—it has taken longer to qualify this jury than any case in history of Vanderburgh or Gibson County.

Ralph Smith: For goodness sake—now in cases in the past how long have they usually—how long did it take in the Spurlock case: Has this case taken longer?

Paul Wever: Yes, that took approximately one week and this has been over a week and we are not even close to getting a jury yet.

Ralph Smith: Are there any other unusual * * * well are there any other unusual aspects—we are not going to ask you knowing you have the case under trial * * * we are only interested in the sidelights of the case.

Paul Wever: I think probably the most unusual thing in this case is *the unusual coverage given to the case by the newspapers and radio. This is what has caused us so much trouble in getting a jury of people who are not unbiased and unprejudiced in the case.*

Ralph Smith: You mean the coverage of the thing that has gone before the actual trial?

Paul Wever: That is right. Of course, that is natural—it is an unusual and very bizarre case and it got a lot of * * * and publicity.

Ralph Smith: And the publicity attached to this case has made it difficult to begin trying it?

Paul Wever: Very.

Ralph Smith: When do you think you will have a jury or can you say at all?

Paul Wever: Well, this is an off-hand opinion, but from my experience I would say it would take at least another week.

Ralph Smith: Another week?

Paul Wever: Yes.

Ralph Smith: And will that set a record for this sort of thing?

Paul Wever: Undoubtedly, yes."

Said broadcast was made during the course of the trial to the inhabitants of said Gibson County.

JURORS

On the 14th day of November, 1955 the selection of a jury was commenced and prospective jurors were examined by both parties. That at the end of four weeks of voir dire examination the Petitioner herein had exhausted all 20 of his peremptory challenges and had challenged all 12 prospective jurors then seated in the jury box. These

were for cause, based upon bias and prejudice against the Petitioner. That a number of said selected jurors testified under oath during said voir dire examination that they had formed and expressed an opinion that the defendant was guilty of the particular crime charged, and some stated they would require evidence to remove said opinion. One selected juror admitted that he could not be fair and impartial. The following are excerpts of testimony of jurors who served on petitioner's jury, made during their voir dire examination.

JUROR—ERNEST HENSLEY:

Q. Is that based upon reading the newspapers?

A. Yes, sir.

Q. And what newspaper do you subscribe to?

A. The Evansville Courier and the Princeton paper.

Q. And you have read news articles about the defendant in the Evansville Courier?

A. Yes, sir.

Q. And you discussed the matter with your wife, is that right?

A. Oh, yes.

Q. Your friends and family?

A. Yes, sir.

Q. Business associates (Tr. p. 3656)?

A. Yes, sir.

Q. Fellow employees?

A. Yes, sir.

Q. And, as a result of the same, you have formed and expressed an opinion as to the defendant's guilt or innocence, is that right?

A. Well, yes, sir.

Q. Has that opinion become more or less a fixed opinion in your mind?

A. No, it's no fixed opinion.

Q. It's no fixed opinion?

A. No fixed opinion.

Q. To set aside this opinion, would it require any evidence?

A. Oh, yes, it would require evidence to set it aside.

Q. It would require some evidence?

A. Yes.

Q. So you think that that would require evidence from the defendant then?

A. Evidence direct from the defendant.

Q. Or from somebody on his behalf?

A. Somebody on his behalf, yes, I think so.

Q. Before you could set this opinion of yours aside and if there wasn't any evidence from the defendant this opinion of yours would carry with you throughout the trial, is that right?

A. If there wasn't any evidence?

Q. Yes.

A. Yes, I think it would.

Q. Do you think you can set this opinion aside without any evidence?

A. Absolutely.

Q. What?

A. Oh, not without any evidence, no.

Q. Not without any evidence?

A. No.

Q. You just couldn't do it, could you?

A. That's right, sir.

Q. This opinion of yours is so well fixed and formed in your mind that you could not lay it aside without evidence?

A. That's right.

Q. Now you understand the law to be that the defendant ordinarily in a criminal case is presumed to be innocent?

A. Yes.

Q. Until proven guilty. Now, in this particular case, because of this opinion of yours, would you presume the defendant to be guilty?

A. Well, I would until I heard evidence otherwise.

Q. You would until you heard some other evidence of his innocence, wouldn't you?

A. That's right.

Q. Then you would presume, then, starting out on this trial, that the defendant was guilty until you heard evidence from him or from someone on his behalf of his innocence?

A. Yes, sir.

Q. There is another principle of law that the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt—you are familiar with that law?

A. Yes.

Q. In this particular case, you would have a reasonable (Tr. p. 3658) doubt as to the defendant's innocence, wouldn't you?

A. Right now, I would.

Q. And that would require evidence to set that doubt aside?

A. Yes, sir.

Q. So, in this particular case, you could not enter into this matter and give the defendant the benefit of the doubt that he is innocent?

A. That's right.

Q. And, under those circumstances, it would be rather impracticable for you to render a fair and impartial verdict based solely upon the evidence?

A. That's right.

Mr. Lopp: Defendant challenges the juror for cause, the cause being he could not render an impar-

tial verdict based solely upon the evidence and he has a fixed opinion that would require evidence to remove it.

By Mr. McGregor:

Q. Mr. Hensley, could you as a juror disregard this opinion—this present opinion—that you now have and keep it from interfering with your verdict in any way?

A. Oh, yes.

Q. I mean, your opinion could be disregarded by you?

A. Only by evidence.

Q. Only by evidence?

A. That's right, sir.

Q. Well, supposing that your opinion was not removed; supposing that you still had it when you went in the jury room? Would you then decide your verdict and render a verdict according to your opinion or according to (Tr. p. 3659) the evidence as presented here in court?

A. According to the evidence, altogether.

Q. That's what I'm getting at. If you were chosen as a juror, Mr. Hensley, it would be your duty and responsibility to decide this case solely and entirely on the law and the evidence as presented here in court?

A. That's right.

Q. You can hear me all right?

A. Yes.

Q. You're not hard of hearing?

A. I am the least bit.

Q. Do you think you could hear the evidence from the witness chair as they testified, then?

A. There would be some doubt.

Q. Have you had any trouble with your hearing?

A. Well, slightly. I'm slightly deaf.

Q. In both ears?

A. No, it's in my left ear.

Q. Can you hear me all right?

A. I can hear you all right.

Q. Again, if you were chosen as a juror, it would be your duty to decide this case solely and entirely on the law and the evidence presented in court, is that right?

A. That's right.

Q. Now, you would do that if chosen as a juror?

A. I would.

Q. Now, what if there wasn't any evidence that would change your opinion? Of course, you would still have it.

A. I would still have it if there wasn't no evidence to change it (Tr. p. 3600).

Q. Let me ask you this—you understand it is the duty of the State of Indiana to prove the man guilty beyond any reasonable doubt?

A. Yes, sir.

Q. You have always heard that a man is innocent until proven guilty?

A. I sure have, yes, sir.

Q. What if you sit on this jury and until the State of Indiana does prove him guilty beyond a reasonable doubt by evidence here in the court room, would you be giving him the benefit of that law which claims that a man is innocent until proven guilty?

A. Yes, I would.

Q. All right, until the State of Indiana proves him guilty, then, beyond any reasonable doubt, would you in your own mind be giving him the benefit of innocence and the presumption of innocence?

A. Yes, if you don't prove him guilty—yes, sir.

Q. And would he be entitled, in your mind, before the State of Indiana proved him guilty beyond a reasonable doubt to an acquittal?

A. Yes, if he wasn't proven, I would, yes.

Q. In other words, he would be entitled in your mind at all times to an acquittal until the State of Indiana proved him guilty beyond any reasonable doubt, is that right?

A. Yes, sir, that's right, sir.

Q. I believe you told Mr. Lopp that it would take some evidence from the defendant to remove this opinion that you now have?

A. Well, it would, but I don't believe it's strong enough (Tr. p. 3661), in my mind to convict any man. The evidence would have to convict him.

Q. In other words, even though that might be true that it would take evidence to remove it from your mind, you could disregard it and it would not influence your verdict, is that what you mean?

A. That's right, yes, sir.

Q. You say you do not have a strong opinion—do you mean that you just have some sort of a suspicion or impression?

A. Well, just what I read, and that's the only thing I know.

Q. You would not consider that a strong opinion?

A. That's right.

Q. In other words, your mind is still open to the reception of evidence, is that right?

A. That's right.

Q. This opinion that you have is not such that it has closed your mind to the reception of evidence?

A. No.

Q. Still have an open mind?

A. That's right.

Q. You understand that under our law, when a defendant is charged with the crime, he enters into the beginning of the trial presumed to be innocent. He

has the advantage of that legal presumption of innocence.

A. Yes, that's true.

Q. And you have always heard that?

A. Yes, sir.

Q. Do you believe in that law?

A. Yes, I do (Tr. p. 3662).

Q. Now, if you are chosen as a juror, then you, as a juror, give him the benefit of that legal presumption of innocence at the beginning of the trial?

A. At the beginning of the trial?

Q. Yes, and make the State of Indiana prove him guilty before you would—

A. Oh, yes, he would have to be proven guilty.

Q He would have to be proven guilty before you would return a verdict of guilty?

A. That's right.

Q. Well, then, you would be giving him the benefit of that legal presumption of innocence at the beginning of the trial, wouldn't you?

A. Yes.

Q. Even though you do have that opinion that you now have, you would still make the State of Indiana prove him guilty beyond any reasonable doubt before he would be found guilty?

A. That's right. That's what I want to make the point, because it's not strong enough in my mind but what the evidence would change it. It's not strong enough in my mind to convict him.

Q. What if it should happen that you would listen to the evidence and you were not convinced beyond a reasonable doubt of his guilt from the evidence here?

A. I couldn't convict no man here unless I clearly knew he was guilty.

Q. From the evidence in court?

A. From the evidence.

Q. In court (Tr. p. 3663)?

A. That's right.

Q. Not information you received outside?

A. That's not evidence, no.

Q. That's not evidence?

A. That's not evidence, no.

Q. And you would not consider what you received outside at all, would you?

A. No, sir.

Q. Now, Mr. Hensley, you've read about certain things connected with this case?

A. Oh, yes, I've read quite a bit.

Q. And at this time you don't know whether they are true or not?

A. No, I don't, no, sir.

Q. Until those matters are presented here in evidence in court, would you consider them in any way in your deliberations in your verdict?

A. How was that?

Q. Until those matters that you have read about have been presented as evidence here in court, would you consider them in any way in your deliberations?

A. Not in the least.

Q. No doubt in your mind about that, is there, Mr. Hensley?

A. No doubt about that. It would have to be evidence.

Q. In other words, you believe you could be fair?

A. Yes, I couldn't be anything else but fair.

Q. You understand that under our law, a defendant is never required to testify in his own behalf, never forced to, nobody can force him to, you understand that?

A. I understand that, yes (Tr. p. 3663½).

Q. And if he does not, it is the law that you, as a

juror, are not to consider that fact any evidence against him—do you believe in that law?

A. Well, I guess I have to believe in that.

Q. Would you follow that law?

A. Yes, I would follow it.

Q. You would follow that law?

A. Oh, yes.

Q. I think it is further the law that if he does not take the stand that you, as a juror, are not to comment upon that fact. Would you follow that law if you were chosen as a juror?

A. I would.

Q. And suppose that there was no evidence at all on behalf of the defendant, Mr. Hensley, would that fact force you, if there was no evidence at all from the defendant, would that fact alone force you to vote guilty, no matter whether the State failed to prove him guilty beyond any reasonable doubt, or not?

A. No.

Q. In other words, you would decide your verdict entirely and solely on the law and the evidence?

A. Altogether.

Q. And would he be entitled in your mind to an acquittal at all times during this trial unless the State of Indiana proved him guilty beyond any reasonable doubt?

A. Yes, yes, he would.

Q. And you tell me that even though you do have this opinion in your mind?

A. That's right, yes, sir (Tr. p. 3664).

Q. In other words, you could set aside your present opinion?

A. Yes, sir.

Q. And keep it from influencing your verdict in any respect?

A. Yes, sir.

Q. And if you were chosen as a juror, you would render an impartial verdict.

A. Yes, sir.

Q. Based entirely and solely on the law and evidence as presented herein in court?

A. Yes, sir.

Q. Do you think you could be fair?

A. Yes, sir.

Q. Are you sure that you could be fair?

A. I am sure.

Q. Are you so sure of it that you would be willing for him to sit there on the jury in your place and you be the defendant, if you knew that he had in his mind the same thoughts, the same attitudes, the same opinions as you now have about him?

A. I don't get that.

Q. All right, you say that you could be fair, is that right?

A. That's right.

Q. Supposing that he, the defendant, were sitting up there in the jury box instead of you and you were sitting down there as the defendant, would you be willing for him to sit on your jury if you knew that he had in his mind the same thoughts, the same opinions, and the same attitudes toward you as you have toward him?

A. Yes, I would.

Q. You would be willing for him to do that (Tr. p. 3665)?

A. Yes, I would.

Q. Now, you tell me that if all you are looking for, if all you would be looking for, would be a fair trial, is that right?

A. That's right.

Q. Now, of course, if you were a defendant, you

would rather have your friends sitting on the jury, wouldn't you?

A. Oh, yes.

Q. You would rather, wouldn't you, but if all you were looking for was a fair trial, that would be all right with you for him to sit on your jury?

A. Yes, sir.

Q. If he had the same ideas about you as you have about him?

A. Yes, sir.

Q. Is there any doubt in your mind about that?

A. No doubt whatever.

Q. Where do you live?

A. I live about three miles southwest of Princeton.

Q. And what's your business?

A. Farming.

Q. You're a farmer, and how old are you?

A. I am sixty years old.

Q. Do you own your own farm there?

A. Yes, sir.

Q. And how many acres do you farm?

A. I farm about 235 acres, that is, me and the boy together. I have a son.

Q. And most of that acreage is in cultivation, is that right (Tr. p. 3666)?

A. Yes.

Q. How long have you lived there and farmed that farm?

A. I have lived where I live now about eleven years.

Q. You've been a farmer all your life, is that right?

A. Yes, sir (Tr. p. 3667).

By Mr. Lopp:

Q. Now, Mr. Hensley, your first name is what?

A. Ernest.

Q. Mr. Ernest Hensley, I think you told us that you have expressed an opinion as to the defendant's guilt or innocence, haven't you?

A. That's right.

Q. And that's from reading the newspapers?

A. Yes.

Q. Listening to the radio?

A. I don't know about the radio. I don't listen to the radio too much. I have a television. I don't pay too much attention to the radio.

Q. Discussing it with your neighbors?

A. Oh, yes.

Q. And your friends and relatives and associates. This opinion that you have formed and expressed as to the defendant's guilt was based upon what you read and heard?

A. Altogether, yes, sir.

Q. Altogether what you read and heard?

A. That's right.

Q. This opinion was expressed and formed by you shortly after the defendant was arrested, or when was it?

A. No, I guess it was formed as I went along (Tr. p. 3834).

Q. As time went along?

A. I think so.

Q. When you came in here as a juror, you still continued to have that opinion?

A. Yes, that's right.

Q. And whether or not this opinion that you formed and expressed as to the defendant was that he was guilty of this particular crime charged?

A. Just in my own mind.

Q. That's right, and that opinion you also formed and expressed an opinion that the defendant confessed to this particular crime?

A. Well, I don't know whether I said that or not, but I understand from the papers that he did.

Q. You have the opinion that he did confess to the crimes?

A. That's right.

Q. You have the opinion, that he confessed to other crimes?

A. I believe so.

Q. And you have an opinion, that the defendant shot, killed and murdered Kerr, isn't that right?

A. Yes, sir, that's right.

Q. And you have formed the opinion that the defendant shot, killed and murdered Kerr while the defendant was perpetrating a robbery?

A. Yes, that's right.

Q. Have you formed any opinion as to the fixing of the penalty in this case?

A. I don't know as I did. I just formed that as I went along.

Q. But you haven't formed any opinion as to the fixing of (Tr. p. 3835) the penalty, is that right, sir?

A. That's right (Tr. p. 3836).

JUROR—FRANK ROBINSON (Tr. p. 2496 L. 9 to Tr. p. 2500 L. 13):

Q. Have you read or heard news stories about this defendant?

A. I have.

Q. What period of time have you heard those stories, Mr. Robinson?

A. Oh, six months, probably, or longer. I don't know exactly.

Q. Sure, and you read the headlines?

A. I have.

Q. The by-lines?

A. Yes, sir.

Q. Saw pictures?

A. Yes, sir.

Q. Talked to your neighbors about this matter?

A. Yes, sir.

Q. Talked to the people in your community?

A. Yes, sir.

Q. Been doing that for the last six months, haven't you?

A. Off and on. I would say part of the time. Off and on I would say I have.

Q. As a result of that you have reached an opinion as to the guilt or innocence of this defendant, haven't you?

A. Well, I haven't formed an opinion. I expressed my (Tr. p. 2496) opinion—I would say it that way.

Q. You have expressed your opinion as to his guilt or innocence?

A. That's right.

Q. Have you formed an opinion?

A. No, sir.

Q. But you expressed an opinion?

A. That's right.

Q. By forming an opinion, what you do mean—you haven't reached any conclusion as to his guilt or innocence?

A. That's correct.

Q. But you have expressed yourself as to whether he is guilty or innocent, haven't you?

A. That's right.

Q. That's just a little hard for me to understand. I wish you would explain that to me. How you could express yourself as to his guilt or innocence but yet not form an opinion?

A. Well, probably I don't know the meaning of the two.

Q. Maybe I don't understand you. Would you try to explain that to me?

A. Well, the way I figure, if a fellow forms an opinion, he is strong in it, but I'm not that way. I expressed my opinion as to how it could be and this and that, but as far as making up my mind, I haven't.

Q. You have formed an opinion but your opinion isn't strong, is that what you mean?

A. That's right.

Q. In other words, you have formed an opinion in order that you can express it, but you say your opinion is not (Tr. p. 2497) strong?

A. That's right.

Q. Now, you have expressed that opinion to several people, have you?

A. No, not necessarily. With my wife mostly, I would say.

Q. Some of the menfolks?

A. Yes.

Q. General talk in the neighborhood?

A. That's right.

Q. And that expression and opinion that you have formed has been for how long?

A. I would say four or five months, something like that. I don't know exactly, as far as that goes.

Q. Do you know of anything right now that would change this opinion that you have formed or expressed? Right now do you know of anything that would change that opinion that you now have formed or expressed as to his guilt or innocence?

A. I don't just exactly get you on that.

Q. Is there anything as of now that would change this opinion that you have formed and expressed as to the defendant's guilt or innocence?

A. No, not at the present.

Q. At the present time you don't know of anything that would change that opinion?

A. Not at the present time.

Q. Would it require some evidence to change this opinion that you have formed or expressed?

A. Yes.

Q. Now, that evidence would have to come either from the defendant or the State of Indiana, is that right?

A. That's right.

Q. And if the defendant did not produce some evidence, you would retain your opinion of guilt or innocence, wouldn't you?

A. That's right.

Q. Then it would require evidence on the part of this defendant to change your opinion, wouldn't it?

A. That's right.

Q. And if there wasn't any evidence, your opinion would carry with you throughout the trial, wouldn't it?

A. Well, I would go by the evidence.

Q. Sure, you would go by the evidence.

A. I don't think the fellow—how is that? I forget how to say that.

Q. A fellow is guilty until he is proven that way?

A. That's right.

Q. What we're getting at right now is that you have read these newspaper headlines, talked to your neighbors, the gentlemen there in your community, and, as a result of the same, you have reached a conclusion. You have expressed and formed an opinion, haven't you?

A. That's right.

Q. And that is as to his guilt or innocence?

A. That's right.

Q. And you are going to retain that opinion that you have formed and expressed, aren't you?

A. That's right.

Q. Unless either the defendant or the State produces evidence to change that opinion?

A. That's right.

Q. That you have formed and expressed?

A. That's right.

Q. As to the defendant's guilt or innocence, is that right?

A. That's right.

Q. Then, in answer to my question, it would require evidence on the part of the defendant to remove that opinion that you have expressed and formed against this defendant as to his guilt or innocence, wouldn't it?

A. Yes, sir.

Q. And that opinion would stick with you until that was removed by evidence?

A. That's right.

CONTINUATION OF FRANK ROBINSON (Tr. p. 3888 L. 15 to Tr. p. 3890 L. 21):

Q. Mr. Robinson, if I recall, at one time you did express the opinion here that the defendant was guilty.

A. I said I expressed my opinion, but I hadn't formed one.

Q. You expressed that opinion that the defendant was guilty?

A. That's right.

Q. And that he committed the particular crime charged?

A. That's right.

Q. You expressed, also, an opinion that the defendant had confessed to this particular crime.

A. I don't believe I have. I don't remember even reading that he confessed. In fact, I learned more sitting here than I remembered about what I read in the paper.

Q. Did you read about other crimes the defendant was alleged to have committed?

A. Well, I suppose I have. I think I told you (Tr. p. 3888).

Q. Did you form an opinion as to whether or not he was guilty of those crimes?

A. No.

Mr. Sandusky: To which we object and move the answer be stricken as not relevant to the case being tried.

The Court: Objection overruled.

Q. Whether or not, Mr. Robinson, you have formed an opinion that the defendant shot, killed and murdered the deceased Kerr?

A. Yes, I have expressed myself, like I said.

Q. Are you of the same opinion that the defendant here is one and the same person that committed the crimes in Kentucky that you read about?

Mr. Sandusky: To which we object for the reason that the defendant is not being tried for crimes committed in Kentucky but is being tried for murder while in the perpetration of a robbery of one Whitney Wesley Kerr.

The Court: Objection sustained.

Mr. Lopp: The defendant at this time challenges the juror for cause, the cause being that the said juror has shown by his answers that he has fixed and settled opinions as to the guilt of the defendant

as to most of the facts and circumstances necessarily relied upon by the State of Indiana for a conviction; that said juror could not be an impartial juror as required by Article (Tr. p. 3889) 1, Section 13 of the Indiana Constitution of the State of Indiana, and that said defendant would be denied his rights under the 14th Amendment of the Federal Constitution of the United States, which is the due process clause; for said juror to be permitted to sit as juror; that said expression of the defendant's guilt, as testified to by said juror, would necessarily be biased and prejudiced against this defendant and said juror would now be impliedly and would be biased and prejudiced against this defendant.

By the Court:

Q. Mr. Robinson, I believe on several occasions you have told the lawyers on both sides of the case and told me that regardless of any opinion you might have once had as to the guilt or innocence of this defendant, that you could and would lay that opinion aside and decide this case solely and impartially upon the law and the evidence introduced in this court room.

A. I have.

Q. And that's the way you feel about it now?

A. I certainly do.

The Court: Show that the challenge is overruled.

Mr. Lopp: To which the defendant excepts (Tr. p. 3890).

Juror—Donald Higginbotham (Tr. p. 2150 L. 20 to Tr. 2159 L. 13):

A. We have discussed it at home.

Q. Your neighbors?

A. Yes, sir.

Q. Did you discuss it with anybody there in Owensville?

A. Well, not that I know of.

Q. Well, was it generally discussed in the community where you live?

A. Quite a bit, yes.

Q. Did you see your name in the newspaper, too, being called as a prospective juror?

A. Yes, sir (Tr. p. 2150).

Q. Has anybody talked to you about it?

A. Oh, some, yes.

Q. What did they about it?

A. All they said was called for petit jury.

Q. Do what?

A. I just seen my name in the paper where I would be called for petit jury.

Q. Have you formed or expressed any opinion as to the guilt or innocence of this defendant?

A. Yes, sir.

Q. And that opinion is based upon the newspaper?

A. Yes, sir.

Q. Talking to other people?

A. Yes, sir.

Q. And how long have you had this opinion, approximately?

A. Well, when they first arrested him.

Q. That's been several months, is that right?

A. Yes.

Q. Have you had anything to change that opinion that you entertained?

A. Not yet.

Q. What?

A. Not yet, no.

Q. Would it require evidence on the part of this defendant or any of his witnesses to change that fixed opinion that you have?

A. They would have to prove it.

Q. Who would have to prove it?

A. Well, their evidence.

Q. No, maybe you misunderstood. You have an opinion (Tr. p. 2151) don't you, as to the guilt or innocence of this defendant?

A. Yes, sir.

Q. And you reached that opinion by reading the newspapers, haven't you?

A. And radio.

Q. And talking to people, haven't you?

A. Yes, sir.

Q. And made up your mind one way or the other as to the guilt or innocence of this defendant, haven't you?

A. Yes, sir.

Q. For you to change that opinion that you entertain, would it require evidence on the part of this defendant?

A. Not the defendant alone, no. They would have to prove, the evidence would have to prove that he wasn't.

Q. Maybe I misunderstood. If you were selected as a juror, you would start out on this case with this opinion you have now, wouldn't you?

A. Yes, sir.

Q. And at this time you don't know of anything that would change your opinion, do you?

A. Well, I have to hear the case first.

Q. Sure, you would. But you would carry with you this opinion that you now have as to the guilt or innocence, wouldn't you?

A. Until it was proved.

Q. What?

A. Until I had reasons to believe different.

Q. Well, you already have your mind made up (Tr. p. 2152).

A. No, not thoroughly.

Q. You have an opinion.

A. I have an opinion, yes.

Q. And would you carry that opinion with you?

A. No, I would try to listen to the facts and what's told in court—the law.

Q. Now, if the court instructed you that the defendant did not have to testify in his own behalf and that fact could not be used against him—

A. Yes, sir.

Q. Would you follow that law?

A. I would try to.

Q. Or would you require this defendant to testify or give some evidence in his own behalf?

A. Well, I don't know. I think if you have a fixed opinion it should be proven otherwise before you could prove it's not that way.

Q. Could you explain to me just a little bit better?

A. Well, I think if you've got your mind made up that you should be changed before you would be different. I think that.

Q. In other words, you would require the defendant to come forward with some evidence?

A. No, I would require some evidence from someplace.

Q. What if the evidence would be the same as what your opinion is right now, would you require this defendant to come forward with some evidence to remove that opinion?

A. No, not necessarily. I would have to have some evidence, though, from somebody to change my opinion (Tr. p. 2153).

Q. Well, that would have to be from the defendant, wouldn't it?

A. No, not exactly.

Q. Or from some of his witnesses, if any?

A. That's right, some of the witnesses.

Q. And if there is no witnesses, then you would convict the defendant?

A. Well, he would have to be proved guilty before I would accept it, yes. The State would have to prove to me he was guilty before I would vote for him guilty.

Q. All right, let's say the State produced evidence that he is guilty and there is some evidence, let's say.

A. Yes, sir.

Q. But that evidence would not be conclusive?

A. I don't know what you mean.

Q. Well, it wouldn't be conclusive to you to have follow it, or to prove that he was guilty beyond a reasonable doubt.

A. They would have to prove beyond a reasonable doubt before I would convict him, yes.

Q. They would have to prove he is guilty beyond a reasonable doubt?

A. Yes, sir.

Q. Let's say their evidence would be that—there would be evidence that he was guilty and then there's equally evidence that he is not guilty and your mind would be divided—would you require the defendant, then, to come forward with further evidence to prove his innocence (Tr. p. 2154)?

A. They would have to prove to me beyond a reasonable doubt before I would convict him.

Q. But you would require him to come forward with evidence?

A. No, not exactly, no.

Q. And if he did not take the witness stand, would you consider that as evidence against him?

A. No, not exactly—no.

Q. Well, would you?

A. No, not him exactly, no. I would have to have some evidence on both sides before—the State would

have to prove to me he was guilty before I would convict him.

Q. Let's say somebody says he did do it, committed the crime, and no other evidence, would you require the defendant to come forward with some evidence?

A. No, not exactly. They would have to prove that he was guilty on a reasonable doubt before I would convict him.

Q. And if there was some doubt, you would find him not guilty, is that right?

A. To the best of my knowledge, yes.

Q. Let me ask you this question—let's say we were down at Evansville and you were sitting down there in Circuit Court on a charge, criminal offense such as this, as the defendant, and this man over here was sitting up there in that jury box down there in Evansville, would you want him to be a juror in your cause, having in mind what you know?

A. Do I have to answer that (Tr. p. 2155)?

Mr. McGregor: Your Honor, we object to that, as to whether he would want this defendant to sit on his jury, having in mind what he knows. Now, that's just not a proper way to put that question, and it would be immaterial as to whether he would want this defendant sitting on his jury or not.

The Court: I don't think he has the whole question in there.

Objection sustained.

By Mr. Lopp:

Q. Mr. Higginbotham, let's assume we were down there in Evansville today and you were on a charge of the same offense that this defendant is and you were down there sitting at the counsel table and this

defendant was sitting up there in that jury box where you are sitting now, now you, knowing and having in your mind what you know about the facts of this case, if any, would you want this defendant to sit as a juror in your case?

A. Well, I'd rather not say.

Q. Well, I'm asking you to.

A. No, I don't think so.

Q. You wouldn't want him to. You would want somebody as a juror that knew nothing about the case, wouldn't you?

A. Yes, sir.

Q. Is that because you would feel that he could not give you a fair trial?

A. Well, I don't know (Tr. p. 2156).

Q. Well, that would be the answer, wouldn't it?

A. I don't know.

Q. Well, what do you think about that deal? That would be the truth of the situation, though, wouldn't it? Would you think that he would be influenced by what he knew, then, in reaching a verdict if he was sitting as your juror with those things in his mind?

A. He might.

Q. He might?

A. I don't quite get your question. I don't exactly know what you're driving at.

Q. Mr. Higginbotham, assuming again that you were down in Vanderburgh County in Evansville on trial for the same charge as this defendant?

A. Yes, sir.

Q. And you were sitting there at the counsel table with your attorneys and this defendant was sitting in the jury box where you are sitting right now.

A. Yes, sir.

Q. And you knew that he knew certain things and

had certain opinions and thoughts—would you want him to sit on the jury in your case?

Mr. Sandusky: Judge, I am going to object to that for the reason that I don't think it's a fair question to put to this juror in the way in which he frames the question. The truth of the matter is, this juror might not want anybody but his own mother sitting on the jury and he presupposes certain situations which are unexplained in the question, and I do not believe it is (Tr. p. 2157) a fair question.

The Court: He can answer the question if he understands it. If he doesn't say so.

A. Well, I don't hardly know what to say.

Q. Would you want him to sit as a juror in your cause, having in mind the things that you know now?

A. Well, I don't know.

Q. What?

A. I don't know.

Q. Would you think that if he was sitting in your place and you was sitting at this table that he would have things in his mind that would cause him to be influenced?

A. Might.

Q. Irrespective of the evidence?

A. I don't know how to answer that.

Q. Well, then, do you then have a certain fixed opinion as to the guilt or innocence of this defendant?

A. Somewhat, yes.

Q. That's from reading these newspapers and radio listening, is that right?

A. Yes, sir.

Q. Is there any other sources that caused you to have this opinion?

A. Well, when all these people were killed, it stopped all of a sudden. I don't know whether that had anything to do with it or not.

Q. And that's what you have in your mind, is that right?

A. Partly, yes (Tr. p. 2158).

Q. In determining whether or not he is guilty or innocent?

A. Well, not altogether but some.

Q. That's what influences your opinion, is that right?

A. Partly, yes.

Q. Would it require evidence to remove that opinion from the State of Indiana or on behalf of the defendant?

A. Well, there would have to be proof, yes.

Q. It would require evidence to remove that opinion that you now have, is that right?

A. Yes, sir.

Q. Either by the State of Indiana or by the defendant, wouldn't it?

A. Yes, sir.

Juror—Clifford Montgomery (Excerpts and condensed recital from testimony):

Name is Clifford Montgomery. Farmer. Read the newspapers about the matter. Subscribe to Princeton Democrat and Evansville Courier. Delivered to my home. Read about this defendant. Discussed the newspaper items with neighbors. "That's something, that murder happened, or what about that" (Tr. p. 2469). I would like to say I haven't reached a conclusion. I have known people who were charged with things they didn't do. I have known people who were turned loose and actually did the job. Newspapers say he confessed. Some one said last Sunday that he did not confess. (Tr. p. 2470). You can't forget what you hear and see. Haven't thought much about this thing (Tr. p. 2471).

I wouldn't feel that I knew all there was to be known about this case if I didn't know why he didn't testify in his own behalf (Tr. p. 2472). Understand the law in criminal case the defendant does not have to testify in his own behalf.

Q. In other words, if he failed to testify, you would want some reason such that he was insane or mentally incompetent or for some reason like that why he should not testify, is that when you mean (Tr. p. 2473)?

A. That's what I mean.

Q. In other words you would require some explanation from his attorney or the court or somebody why he hasn't testified wouldn't you?

A. I would require some mental knowledge or feeling as to why he didn't testify before I could say yes or no, on a matter of such great importance (Tr. p. 2474).

. . . . . .

Has not changed his opinion since yesterday. I don't think I formed an opinion as to the guilt or innocence of the defendant. I don't think I am biased or prejudiced for or against him. What I read in the newspapers I don't think has caused me to be biased or prejudiced (Tr. p. 2629). Police officers' statements would not be conclusive (Tr. p. 2630).

. . . . . .

Read the newspaper accounts of this crime about the defendant in Evansville Courier. I read in the paper that the police had a man that they claimed he confessed. I don't know whether he did or not. I don't know whether this particular defendant. Read the newspapers that this defendant has been charged or allegedly committed other offenses. Well, I read that there were other murders and that the police supposedly reported to the papers. I guess they did, I

don't know—the paper had it that this man confessed or claimed he did it, or something of that nature. I don't know what he confessed to any robberies, any specific murders or with any murder. I don't know. I don't have any opinion whether this defendant committed those offenses in Kentucky—somebody did, but I don't know who.

Juror—William Hensley (Excerpts and condensed recital from testimony):

Q. Whether or not you have formed or expressed an opinion regarding the guilt or innocence of this defendant?.

A. Well, just what I read in the newspapers, Judge, Your Honor (Tr. p. 2221).

I thought you meant, had formed an opinion since I been sitting in the court room.

Q. Have you?

A. I said I hadn't, but when I was put in here, I said I had to a certain extent (Tr. p. 2632). I heard of other charges or offenses against the defendant. Read them in the newspapers. The other offenses these fellows stated that took place in Kentucky.

Q. Have you had any opinion as to defendant's guilt or innocence in this matter?

A. Not too much (Tr. p. 3312).

Q. I understand you said at one time you formed or expressed an opinion as to defendant's guilt?

A. Just slightly, sir, when I came in here. Read newspaper accounts of other crimes. I don't know if it was the defendant, I don't know who it was. I read where it was (Tr. p. 3846). Do not know what the nature of the other offenses were, just what I read. Just where some person had killed those people in Kentucky. I don't know who done it or anything about

it. I have no opinion who done it. I don't cultivate such stuff in my mind.

Q. Your slight opinion that you had of defendant's guilt, was that, that the defendant had shot, killed and murdered the deceased, Kerr?

A. All I know is what I read in the newspaper. I don't know what you call that an opinion or not. I know somebody did it. But, as far as he done it, I don't know.

Q. Do you have the opinion though, that he did it?

A. Well, according to the newspapers, naturally you would have some slight opinion, sure, but, I have no fixed opinion. I don't know who did it (Tr. p. 3847).

Q. But, you did have your opinion that the defendant did shoot, kill and murder Kerr?

A. According to the newspapers at the time, but, as I say, I don't sit around and cultivate that stuff.

No, I don't have that opinion. I read the newspaper where he shot him. Whether he did it robbing him or not, I don't know.

Q. Do you have an opinion whether or not the defendant committed the crimes in Kentucky?

A. I certainly could, Judge. Not that I want to sit here, but I can give the man as fair a trial as I would expect.

JUROR—JASPER JOHNSON (Excerpts and condensed recital from testimony):

Take the newspaper, Princeton and Evansville Courier. Read in the paper about the defendant (Tr. p. 2505). Probably discussed the case with my neighbors. Probably discussed it with my customers. My wife.

Q. Have you formed an opinion as a result of these newspaper articles?

A. Well, most of my opinion was the crime was committed, the shock of it that is all, like any natural feeling anyone would get. Have not formed any opinion as to defendant's guilt. I have heard talk generally about defendant's guilt (Tr. p. 2506). Reasonable doubt was put in my mind. Would not consider what I read in the newspapers as evidence.

Q. You merely think you could set that aside?

A. Well, it has been some time since I read them and you hear different things here and there. It would have to be evidence before I would believe it (Tr. p. 2507). I believe in the enforcement of the law. Understand the law "and on conviction shall suffer death or be imprisoned in the state prison during life" (Tr. p. 2520). Does not have conscientious opinion of the death penalty that would keep him from returning the death penalty verdict. If evidence warranted would as readily call the verdict of death penalty as one for life imprisonment (Tr. p. 2521).

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Q. You haven't formed or expressed any opinion as to the guilt or innocence of this defendant?

A. Not definitely at all; of course, everybody reads the papers and you hear it discussed, but not to form any definite opinion (Tr. p. 2627).

Q. You have never sat on a jury, have you, in a criminal case?

A. It wasn't this strong a case.

Q. Now, you don't think you have formed any opinion about the guilt or innocence of this defendant then?

A. Well, no, no set opinion (Tr. p. 2628).

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I have read the newspapers about the defendant (Tr. p. 3318).

Q. Have you formed any opinion as to his guilt or innocence?

A. I wouldn't call it an opinion. I might have the impression being as that is, the person that was arrested. I read the Evansville Courier and Princeton paper. I read about when the defendant was arrested. I read the news items about the other offenses against the defendant. The other offenses were the Holland case in Evansville and in Kentucky and at Mt. Vernon.

Q. This impression that you have, after reading those papers, is it that the defendant is guilty or not guilty?

A. Yes, the impression is that he is.

Q. That he is guilty?

A. Possibly, in some of them.

Yes, I think it would be natural that you get the impression from reading the account (Tr. p. 3319).

Q. Mr. Johnson, as I understand, you have at one time stated here that you have expressed or formed an opinion that the defendant was guilty?

A. More or less an impression than an opinion. I have not expressed the opinion nor the impression that he was guilty. I have read the newspapers about the defendant. I did not read the confession. The confession was not discussed (Tr. p. 3330). I have read about this defendant being accused of having committed other crimes.

Q. Whether or not you have this opinion or impression that the defendant did shoot, kill, murder one Kerr?

A. The impression.

Q. Whether or not you have the opinion or the impression that the defendant shot, killed, murdered one Kerr while in the commission of a robbery?

A. Same impression (Tr. p. 3851).

By the Court:

Q. Now, Mr. Johnson, I believe on numerous occasions you have told counsel on both sides and also told this court that regardless of any opinion or impression that you ever had, that you could lay that impression aside and try this case solely upon the law and the evidence introduced here and arrive at your verdict solely upon the law and the evidenee as introduced in this court room, is that right?

A. Yes, sir.

Q. And that's the way you feel about it?

A. Yes, sir (Tr. pp. 3851-3852).

Juror—Phillip Montgomery (Excerpts and condensed recital from testimony):

Name is Phillip Montgomery. I understand the nature of the case. All I know about the case is what I read in the newspapers. I have heard people talk about the case. All I know is newspaper talk, hearsay and rumors.

Q. Now, from listening to that newspaper talk and so on, have you formed any opinion at this time as to the guilt or innocence of the defendant?

A. Well, I suppose I have in a sense, yes, sir.

Q. Is it an opinion or impression you might have concerning this then?

A. I wouldn't know, sir, how (Tr. p. 2678).

Q. Would you say you have a fixed opinion concerning the guilt or innocence of the defendant?

A. Yes, sir.

Q. You have ideas one way or the other from reading the newspapers?

A. Yes, sir.

He thinks he can set aside his opinion (Tr. p. 2679). Man is presumed to be innocent until proven guilty.

Q. Well, if you are chosen as a juror could you follow that law?

A. I could try.

Q. I say could you? We got to know that?

A. I suppose so. I wouldn't just definitely answer that, sir. I think I could look at it with an open mind (Tr. p. 2680). I believe in enforcement of the law.

Asked if he had conscientious opinions concerning the death penalty that would preclude him from fixing the death penalty:

No, sir, I believe I could stand up to that (Tr. p. 2681) I could return a verdict giving the death penalty. I could return a verdict for the death penalty as one for life imprisonment as readily (Tr. p. 2682).

Not changed my opinion since sitting here about these matters. Take the Evansville Courier. Brought to my home. Read it. Read the newspaper accounts about this defendant. Discussed it with other people.

Q. Would you say you have expressed or formed an opinion as to his guilt or innocence?

A. I probably have at times earlier in the case when it first came out in the paper (Tr. p. 2854). I read of that Kentucky account, and that's all I can remember reading in the papers, sir. That's where this family was killed. That's the murder down there.

Q. This defendant was alleged to have murdered?

A. That was in the paper that he did.

Q. Do you have any opinion at this time as to any punishment to be fixed in this particular case?

A. Not as yet, sir.

By the Court:

Q. Mr. Montgomery, I will ask you whether or not you have been examined on this matter on several different occasions both by the State and the Defense?

A. Yes, sir, I have.

Q. And I believe you stated at that time on all of these examinations that even though you might have at one time had an opinion, that you would lay that opinion aside and give this man a fair and impartial trial based solely and entirely upon the law and evidence introduced in this court room?

A. I did that, sir.

Q. And that's what you will do?

A. Yes, sir (Tr. pp. 3854-3856).

JUROR—NEWMAN S. GWALTNEY (Excerpts and condensed recital from testimony):

I am a farmer. Subscribe to Princeton paper. Read articles about this defendant in newspaper.

Q. Can you tell anything that you read?

A. About the only thing I remember is I couldn't see how one man could have committed that killing in Kentucky. At least, I would have liked to have been one of those three men.

Q. Did you read of any other offenses this defendant was alleged to have committed?

A. If I did, I have forgotten them. I have heard opinions.

Q. Have opinions been expressed to you as to defendant's guilt or innocence by other people?

A. Why, sure (Tr. p. 3891).

Q. Who were those people?

A. They were people in the community.

Q. Can you give me some idea who these other people were that expressed their opinions to you?

A. Yes, well, there was a farmer in Kentucky said he would like to get his hands on him.

Q. You knew this farmer in Kentucky?

A. Yes, sir.

Q. Was this farmer a friend of yours?

A. Yes, sir (Tr. p. 3892).

He just stated that whoever did do it, he would like to be in a gang to get hold of him.

Q. Did you have any opinion at that time?

A. More or less. If you meet a person you form an opinion of some kind.

Q. Well, do you think the fellow that committed the crimes in Kentucky committed this one we are talking about in Indiana, about Kerr?

A. It is possible. I haven't formed any opinion to that effect. From evidence you gather you would think yes, all the crimes was committed by the same party.

Q. And that impression would be from reading the newspapers?

A. One way or the other, yes, sir.

* * * * * * *

Q. But you have acquired this information that the defendant committed this particular crime, is that right?

A. Yes.

Q. That he is charged with now?

A. Yes.

Q. You have acquired information that the defendant committed other crimes, too?

A. Yes, sir.

Q. What other crimes?

A. Well, he is supposed to be connected with all of them, the three in Kentucky.

Q. Did you acquire information that this defendant did then shoot, kill and murder the deceased Kerr charged in this matter?

A. Looks like to me you are driving at the same thing again.

Q. Well, did you acquire that information?

A. I said it once (Tr. p. 3894).

Q. Did you acquire the information that the defendant shot the deceased Kerr in the perpetration of a robbery?

A. Through the same source, yes.

Q. That's the newspaper, is that right, sir, and conversation with friends and relatives?

A. Right.

Q. Did you acquire information that this defendant has confessed to those crimes?

A. I have heard that somewhere.

Q. Was it discussed by you at home with your family?

A. That wouldn't make a very good mealtime topic (Tr. p. 3895).

Q. Have you formed or expressed any opinion as to the punishment to be fixed for the commission of the criminal offenses in Kentucky?

A. I have not formed or expressed any opinion as to the punishment to be fixed in the particular charge now before the court.

Q. Have you had any information by newspapers or by the conversation that would cause your opinion to be that the defendant was innocent of the crime charged?

A. No, sir (Tr. p. 3896).

* * * * * * *

By the Court:

Q. Mr. Gwaltney, I believe you advised us that you have never formed any opinion on this matter as to the guilt or innocence of this man?

A. That's right.

Q. You do not have any opinion at this time as to the guilt or innocence of this defendant?

A. Why, no.

Q. And if you are selected as a juror in this case, whether or not you could honestly and impartially try this defendant on the charge on which he is charged here and be governed solely and entirely by the law and evidence introduced in this court room?

A. To the best of my knowledge, yes, sir (Tr. p. 3897 and p. 3898).

JUROR—EUGENE PEMBERTON (Excerpts and condensed recital from testimony):

I am a farmer. Take the Princeton paper. I have read articles in the newspapers about the defendant. Heard radio programs about him. We have talked about the case. We have discussed his guilt or innocence. Can't truthfully say that I ever read anything. Read just the other things regarding the defendant, not this particular crime. According to the newspapers read about the other alleged crimes (Tr. p. 4062). I believe they were concerning a woman around New Harmony, and then there was something about some people in Kentucky.

Q. And is it your opinion that the party that committed those other crimes that you enumerated, that is Posey County and Henderson County crimes, would be the one and same party that committed this particular crime?

A. As far as my opinion is concerned I have never expressed none, except that there was a connection, but I have read where there was such a connection (Tr. p. 4064).

Have not formed an opinion that the party committed the other crimes committed this crime.

Q. But what you read would state what?

A. At least that is the impression.

Q. At least the impression?

A. Yes, that is, the paper created the impression that such was so (Tr. p. 4064).

Do not remember whether the newspapers said anything about a confession. I have not formed an opinion. No one has talked to me about the case (Tr. p. 4065).

The articles that I read in the newspapers and the people talked to did mention the defendant's name with the particular crimes. Read the newspaper articles for approximately a year or so. Do not know the people that are alleged to have been killed (Tr. p. 4066). Reason he hasn't formed any opinion after reading the newspapers, "Well, one thing, I don't spend much time with stuff like that. I got other things to do, and my mind is on other things" (Tr. p. 4067). Newspaper articles not sufficient to form an opinion on.

Q. Has any member of your family been harmed or violently assaulted?

A. It was my father.

Q. What happened to him?

A. He was shot and killed (Tr. p. 4309).

Q. Was there a criminal prosecution, as a result of that?

A. Yes, sir.

Q. Whether or not there was a murder charge filed against the accused person that shot your father?

A. Yes.

Q. Was he convicted?

A. Yes.

I have raised the family and sent them to school (Tr. p. 4310). I have no feeling against the defendant because of this previous occurrence. Will not use the unfortunate experience he has had against the defendant (Tr. p. 4311).

By Mr. McGregor:

Q. Mr. Pemberton, you say you could and would give both sides a fair trial based entirely and solely on the law and the evidence, is that right?

A. Yes, sir, I think I could.

Q. And this experience Mr. Lopp was talking about concerning your father would not enter into your verdict in any respect, is that right?

A. No, sir.

Q. And I believe you say you have no opinion as to the guilt or innocence of the defendant?

A. No, sir.

Q. And you have no opinion as to any of the alleged facts concerning this case, is that right?

A. That's right, sir.

By the Court:

Q. You could give this defendant as well as any other defendant, a fair and impartial trial based solely and entirely upon the law and evidence introduced in this court room, is that right?

A. Yes, sir.

Q. And that's what you would do?

A. That's right, sir.

JUROR—RALPH W. BAILEY (Excerpts and condensed recital from testimony):

Work at International Harvester. Subscribe to Evansville Courier. Read what's been published in the paper about the defendant. Read articles in the paper about the defendant (Tr. p. 4295). Talked to the man I ride back and forth to work with quite a bit. Read the newspapers, actually, the crimes he was supposed to have committed, that's the general outline of the newspapers. Read or heard about the

crime of the deceased Kerr. Read about the defendant down in Kentucky, liquor store, and the one in Posey County (Tr. p. 4296). Did not read about the confession. What I read was discussed over a period of time.

Q. But, until this trial started here, you have surely formed some opinion as to his guilt from reading the newspapers and talking to your people, haven't you?

A. Normally, I suppose like everybody else, you normally think that the man must be guilty of his crimes.

Q. It would be quite obvious in thinking that?

A. Yes, in reading the newspaper articles and all you right away say, "Well, I guess the man is guilty."

I believe it is up to the court to prove the man guilty (Tr. p. 4298). I think the newspapers is just there to give the news and views of things, that's why they are printed. You can't believe all you read in the newspapers.

. . . . . .

I read in the newspapers about the holdup at the service station. I believe that's what it was called—service station. That was the first one. Can't recall what the defendant was doing at the time he shot the deceased.

CONFESSION

During the course of the trial over the objection of the petitioner a purported admission and confession was permitted to be introduced into evidence. That said question propounded by the Prosecuting Attorney to one Dan Hudson during the course of the trial being as follows:

"What if anything did the defendant say to you about the murder of Whitney Wesley Kerr when

he talked to you on Tuesday, April 12, 1955?" (Tr. p. 1615)

That the petitioner objected to said question and the following objection and offer to prove is found in Tr. pp. 1615 to 1623, which reads as follows, to wit:

Mr. Lopp: To which the defendant objects for the following reasons: that any admission or admissions, confession or statement made at the time referred to or during the time the defendant was in custody of this police officer, the police department of the City of Evansville and while confined in the city jail in the City of Evansville were made:

1. Under inducement, under the influence of fear produced by threats, intimidation and undue influence.

2. That the police officers inflicted physical violence and punishment upon the defendant then and there being held in custody by said police officers; that said police officers threatened to inflict personal violence and injury to the defendant and that the said police officers deprived the defendant of necessary food, sleep and all for the purpose of extorting from the defendant an admission and confession that he was guilty of violating some municipal, state or federal laws, and, particularly, the murder of one Kerr.

3. That said admissions, confessions, as stated before, if any made, were made under duress, fraud and coercion and under lawless inquisitorial means and in violation of the Bill of Rights of the Constitution of the State of Indiana, Article I, Section 14, which provides: "No person in any criminal prosecution shall be compelled to testify against him-

self"; also, in violation of the Constitution of the State of Indiana, Article I, Section 15, which provides "No person arrested or confined in jail shall be treated with unnecessary rigor"; in violation of the Constitution of the State of Indiana, Article I, Section 12, which provides: "All courts shall be open and every man for injury done to him in his person, property, or reputation shall have remedy in due course of law, justice shall be administered freely and without purchase, completely and without denial, speedily and without delay"; and in violation of Section 9-704, Burns' Indiana Statutes Annotated, 1933-1942 Replacement, the same being Chapter 169, Section 65, page 584 of the Acts of the General Assembly of the State of Indiana for the year 1905 and amended by Chapter 108, Section 1, page 442 of the Acts of the General Assembly of the State of Indiana for the year 1909, which provides in part as follows: "When an officer arrests an accused, either upon his warrant or for a misdemeanor committed within the view of the officer or for a felony when the officer has cause to believe that such crime has been committed, he shall take the accused before the magistrate issuing a warrant, if a warrant has been issued, or before the nearest magistrate, if no warrant has been issued and it shall be the duty of the magistrate to immediately docket the cause in a well-bounded book used for the sole purpose of maintaining a docket under the title, State of Indiana v. ————, inserting the Christian and surname of the accused, and to hear the cause and either acquit, convict or punish and hold to bail, the offender, or, if the offense be not bailable, to commit him to jail as the facts and law may justify"; and furthermore, in violation of

Section 9-711, Burns' Indiana Statutes Annotated 1942 Replacement, the same being Chapter 169, Section 72, page 584 of the Acts of the General Assembly of the State of Indiana for the year 1905, further providing, "When the offense charged is a felony or a misdemeanor in which the lowest fine provided by law is larger than the Justice shall have jurisdiction to assess and the Justice, upon the hearing, is of the opinion that the accused shall be held to answer such charge, he shall be recognized to appear at the next term of the criminal court of such county, or, if there be no criminal court, then in the circuit court of such county," and Section 4-2402, Burns' Indiana Statutes Annotated, 1946 Replacement, the same being Chapter 129, Section 216, page 219 of the Acts of the General Assembly of Indiana for 1905, as amended, being Chapter 70, Section 1, page 153 of the Acts of the General Assembly of the State of Indiana 1921, as amended, being Chapter 7, Section 1, page 12 of the Acts of the General Assembly of Indiana for 1939, providing in part: "The city judge shall hold daily sessions of the city court, Sunday and legal holidays excepted, at a place to be provided and designated by the common council. He shall have and exercise within the city in which such court is located the powers of jurisdiction now or hereinafter conferred upon Justices of the Peace and in all cases of crimes and misdemeanors, he shall also have original concurrent jurisdiction with the circuit court or criminal court in all cases of petit larceny and all other violations of the law of the state where the penalty provided therefor cannot exceed a fine of five hundred dollars and imprisonment in the jail or work house not exceeding six

months, or either or both, provided that such city judge in any such case being brought before him, charging any person with a crime or misdemeanor, if in the opinion of such judge the punishment which he is authorized to assess is not adequate to the offense, may so find, and, in such case, he shall hold such prisoner to bail for his appearance before the proper court or commit him to jail in default of such bail"; in violation of Section 9-1024, Burns' Indiana Statutes, 1942 Replacement, which provides as follows: "All judicial officers, sheriffs, deputy sheriffs, coroners, constables, marshals, deputy marshals, police officers, watchmen and the conductors of all trains or cars carrying passengers or freight within the state while on duty on their respective trains or cars, may arrest and detain any person found violating any law of this state until a legal warrant can be obtained"; in violation of Article I, Section 13 of the Constitution of the State of Indiana, and in violation of the due process clause of the 14th Amendment to the Constitution of the United States of America, in that said police officers unlawfully, illegally, so holding and detaining the defendant, denied the defendant the right of counsel and that such denial and refusal on the part of the police officers was a denial of due process as defined by Article I, Section 13 of the Constitution of the State of Indiana and the 14th Amendment to the Constitution of the United States of America. It is illegal in this: that all the aforesaid acts of said police officers, including said unlawful detention of the defendant, were acts on the part of executive and administrative officers of the State of Indiana in the execution of the State laws of Indiana, which constituted State action, within the purview of the 14th Amendment to the Constitution

of the United States of America, said 14th Amendment governing any action of a state "where through its legislative, through its courts or through its executive or administrative officers . . ." It is illegal in this: that anything and everything learned by the police officers while interrogating the defendant at any time and all times prior to a preliminary charge being filed in the city court in the City of Evansville, Indiana, during all of the time that the defendant was in the sole and exclusive custody of the police officers, was so learned by them without the voluntary consent of the defendant: that the defendant was then and there in sole and absolute custody and control of the police officers and had been without sleep or rest for twenty-four hours or more and in continuous interrogation, that any statement so made by the defendant, whether oral or written, was involuntarily given and was made and given under inducement, under the influence of fear, produced by threats, intimidation, undue influence and fraud, and the action of the police officers were coercive and in violation of the due process clause of the 14th Amendment to the Constitution of the United States of America and of Article I, Section 12, of the Constitution of the State of Indiana, and that the defendant did not thereby waive his constitutional immunities by making said statements, whether oral or written.

Illegal in this: that due to said illegal, unlawful and fraudulent procuring of the oral statement from the defendant by said police officers, an attempt is being made to compel the defendant to be a witness against himself involuntarily and in a criminal prosecution in violation of Article I, Section 14, of the Constitution of the State of Indiana, and in violation

of the due process clause of the 14th Amendment to the Constitution of the United States of America. Illegal in this: that the defendant had been detained by the police officers an unreasonable time after his arrest before the alleged confession statements, admissions, written or oral, were made, all in direct and constant violation of the due process clause of the 14th Amendment to the Constitution of the United States of America, and in violation of Article I, Section 14, Article I, Section 15, Article I, Section 12 of the Constitution of the State of Indiana, and in violation of Sections 9-704 and 9-1024, Burns' Indiana Statutes Annotated, 1942 Replacement. Illegal in this: that said written, if any, and oral statements procured by the police officers from the defendant were obtained in a manner which rendered them untrustworthy and were procured by coercion, duress and fraud and in violation of the due process clause of the 14th Amendment to the Constitution of the United States. Illegal in this that upon arresting the defendant, the police officers put the defendant in a barren cell at police headquarters in the City of Evansville, Indiana, and in a sweat box room and kept him there incommunicado for a period of seven days and submitted him to unrelenting questioning without proper food and sleep and rest instead of taking the defendant forthwith before a Justice of the Peace or a court or without procuring a warrant for his arrest nor taking him before some judicial officer as the law requires in order to determine the sufficiency of the justification for his detention, and the police officers' conduct was a flagrant disregard of the laws of the Constitution, both of the State and Federal, in such case made and provided, and such action and conduct

of the police officers toward the defendant was inherently coercive and in direct and constant violation of the statutes of the State of Indiana, the due process clause of the 14th Amendment to the Constitution of the United States of America; that the defendant was denied the right to counsel during the wrongful and unlawful detention by the City Police Department of the City of Evansville. He was denied the right to be advised of his legal rights by counsel, a lawyer appointed by a court of law to represent this defendant at any time during the time he was unlawfully detained; that said defendant was never brought before a magistrate or court of law and advised of his rights to counsel and have counsel appointed for him to represent him during these seven long days he was held in the city jail in the City of Evansville.

The defendant further objects for the reason that the corpus delicti of the charge now pending against this defendant has not been proved in that, first, the deceased, Kerr was murdered; secondly, the corpus delicti of robbery, being part of the charge, has not been proven by the State of Indiana. There has been no evidence that the deceased, Kerr, was robbed of $68.11, or any sum of money, by this defendant or any other person.

The defendant further states that he was unlawfully and illegally taken from Warrick County in the State of Indiana to Vanderburgh County, State of Indiana, by police officers, one Praither, Clayborne and Cornett; that he was arrested illegally by said police officers. At that time, they had no warrant for his arrest; that said defendant was not in flight and said police officers were not in pursuit of said defendant; that the said police officers did not

take the defendant forthwith to a magistrate or court of law in Warrick County; that they had no warrant from any court in the State of Indiana for the arrest of the defendant; that they did not have probable cause or justification for arresting the defendant under the laws of the State of Indiana; that the defendant had not committed any misdemeanor in the presence of said police officers mentioned; that said defendant had not committed a felony in the presence of police officers mentioned; that the said police officers returned said defendant from Warrick County, Indiana to the City Police Department in the City of Evansville and held said defendant incommunicado for a period of seven days in the city jail in the City of Evansville and did not take this defendant before any court of law or magistrate or file any charges against this defendant during said time; that the officer claiming to arrest said defendant, one Cornett; being a State Police Officer; that said State Police Officer did not deliver the defendant to the Sheriff of either Warrick County or to the Sheriff of Vanderburgh County as required by law; that at no time from the time of the arrest of the defendant for a period of seven days thereafter was a warrant issued for his arrest or detention; that the defendant did not voluntarily, freely, under any circumstances, make any statement or confession to this witness or any other police officer in whose custody he was at said time, all of which the defendant now asks leave of court to prove and introduce evidence to prove the same.

The Court: Objection overruled.

That the said witness was permitted to answer, and he answered as follows:

"He told me that he had shot and killed Wesley Kerr."

PROSECUTING ATTORNEY ARGUING CASE BEFORE JURY AFTER TESTIFYING AS WITNESS

Paul B. Wever, prosecuting attorney for the State of Indiana in the within cause, assisted in the selection of jurors during the voir dire examination, examined witnesses during the course of the trial, was permitted, over Petitioner's objections to testify as a witness, and was then permitted to make an argument to the jury, over Petitioner's objection, as shown by the record as follows:

That said Paul B. Wever testified as a witness as shown by the Transcript at page 1824.

That the Petitioner herein objected to said Prosecuting Attorney testifying, which objection is found in Transcript p. 1833 L. 23 to Tr. p. 1834 L. 11, Petitioner's Exhibit No. 1, and reads in part as follows:

> The defendant further objects for the reason that the witness is the duly qualified Prosecuting Attorney of Vanderburgh County, and the duly appointed Prosecuting Attorney for this cause; that said witness as said Prosecutor has participated in the selection of this jury, questioning the jurors on the voir dire, and has participated in the examination of the witnesses in this cause; that said witness is a paid witness; to permit said witness to testify in this matter would be permitting said witness to be a Judge for his position as Prosecutor is a judicial office, and by virtue thereof, he would be the Judge, the Prosecutor and a witness in this cause against this defendant; violating the defendant's constitutional rights, and his testimony would be inadmis-

sible for the further reason that said court has made an order of the separation of the witnesses in this cause, and to permit this witness to testify at this time would be prejudicial against this defendant and illegal.

That Paul B. Wever, Prosecuting Attorney made a final argument before said jury, over Petitioner's objection, as shown by Tr. p. 4770 L. 1 to Tr. p. 4771 L. 5, which objection reads as follows, to-wit:

JAMES D. LOPP, ATTORNEY FOR DEFENDANT:

The defendant at this time, being informed that Paul Wever, Prosecuting Attorney, is now preparing to address the jury in argument of this cause before said jury and before the beginning of said argument by said Paul Wever, the defendant now objects to the said Paul Wever arguing and participating in the argument of this cause before this jury for the reasons:

1. That it is unethical for him to participate in the argument of this cause due to the fact that he has become a witness for the State of Indiana.

2. The Court in permitting said Paul Wever to argue the facts in this case before said jury, would be permitting him to comment upon his own testimony and give further weight to the same and further weight to the State of Indiana's evidence.

3. That the defendant will not be, under said circumstances, offered the privilege of cross-examining the said Paul Wever on matters that he will state before said jury.

4. That any statements said Prosecuting Attorney will make before said jury will be prejudicial to

this defendant's rights and denying him the right to cross-examine said Paul Wever, all of which the defendant now offers to prove out of the presence of the jury.

The Court: Objection overruled.

James D. Lopp: The defendant now requests the reporting of the address of Paul Wever to the jury in order that the defendant may file a special bill of exception.

The Court: Show that that will be overruled. I do not know of any law at all that requires a Reporter to take final arguments.

That thereafter, Paul B. Wever stated before the jury:

"I testified myself what was told me." (Tr. p. 471, L. 11).

Summary of Argument

1.

Petitioner was not afforded a fair and impartial trial within the meaning of the Fourteenth Amendment to the Constitution of the United States for the reason that over half of the jurors selected to try the cause had preconceived opinions that the Petitioner was guilty of the offense with which he was charged. Petitioner's verified motion for change of venue from the county of trial, and verified motions for continuance were denied without affording Petitioner a hearing thereon. Petitioner exhausted all his peremptory challenges, and of the 431 prospective jurors examined, 269 were excused because of their fixed opinions as to Petitioner's guilt. In the dissenting opinion of Justice Duffy of the United States Court of Appeals for the Sev-

enth Circuit in this cause on remandment, he stated at 271 F. 2d 552, 561:

"In my judgment defendant was not afforded due process of law in the trial which resulted in his conviction and upon which verdict the death sentence was imposed.

"There is no dispute as to the fact that more than half of the jurors who sat in the case had preconceived ideas that defendant was guilty of the offense charged. Some of them testified on the voir dire that it would take evidence to change that opinion. Defendant had exhausted his twenty peremptory challenges. His several motions for continuances had been denied.

"One of the most important rights of our citizens is the right to a public trial by a fair and impartial jury. The courts should be ever alert to preserve that right untarnished. *Baker* v. *Hudspeth*, 10 Cir., 129 F. 2d 779, 781.

"I am well aware that a brutal crime is almost certain to receive extensive news coverage by newspapers, radio and television. I realize that in the instant case a prolonged effort was made to obtain an impartial jury, but I am, nevertheless, forced to the conclusion that the jury, as finally constituted, was not impartial. Possibly it was as impartial a jury as could have been found in Gibson County on that date, but that was not sufficient. That did not insure due process."

2.

Petitioner's verified motions for change of venue from Gibson County, Indiana, where trial was had in this cause, based upon the alleged bias and prejudice in said community against this petitioner, were denied, notwithstanding the fact that the prayer of each of Petitioner's motions offered to prove and requested an opportunity to prove

bias and prejudice against this petitioner in Gibson County. The trial court denied the motions for the sole reason that Petitioner had previously been granted a change of venue from the immediate adjoining County of Vanderburgh, Indiana. At no time was Petitioner ever afforded an opportunity to introduce evidence in support of the allegations of bias and prejudice, in addition to those matters, things and exhibits set forth in the verified motions. Petitioner was denied without a hearing the opportunity to prove actual bias and prejudice. The State of Indiana at no time filed affirmative answers denying the allegations set forth in the verified motions, although the prosecuting attorney did admit in a radio broadcast that because of the extensive news coverage, it was difficult to get a jury. Even though the Petitioner's motions were denied without permitting him to introduce evidence, the voir dire examination and the answers given during the jury examination, together with the statements of those jurors finally selected, coupled with the evidence in the verified motions for continuance filed in this cause, there was sufficient evidence to establish that Petitioner was denied a fair and impartial trial before a fair and impartial jury, as contemplated by the Fourteenth Amendment to the Constitution of the United States, and that a change of venue from Gibson County, Indiana, should have been granted.

Shepherd, et al. v. *State of Florida* (1951), 341 U.S. 50, 71 S. Ct. 549, 95 L. Ed. 740;
Juelich v. *U. S.* (5th Cir. 1954), 214 F. 2d 950;
People v. *McKay* (1951), 37 Cal. 2d 792, 236 P. 2d 145.

3.

Petitioner's verified motions for a continuance based upon the bias and prejudice in Gibson County, Indiana where this cause was to be tried, which were filed prior to

and during the course of the trial were denied. These motions were supported by exhibits, including newspaper articles and radio broadcasts, some of which were admittedly read by some of the jurors finally selected in this cause, including articles which referred to Petitioner as "the confessed killer of six persons." The trial court, as with the motions for change of venue, denied the motions for continuance, although the prayer of each motion offered to prove and requested an opportunity to prove bias and prejudice. At no time was the Petitioner ever afforded an opportunity to introduce evidence in support of the allegations of bias and prejudice, in addition to those matters, things or exhibits set forth in the motions themselves. Petitioner was arbitrarily denied an opportunity to prove actual bias and prejudice at a hearing. The State of Indiana, as with the motions for change of venue, did not deny the allegations set forth in the verified motions for continuance. As with the motions for change of venue, the evidence in the motions, together with the voir dire examination of prospective jurors and jurors finally selected in this cause, who were of the opinion that this Petitioner was guilty, the record is clear that the Petitioner was denied a fair and impartial trial before a fair and impartial jury, as contemplated by the Fourteenth Amendment to the Constitution of the United States, because of the actual bias and prejudice existing at the time of trial in the community in which this cause was tried, and under these circumstances the trial court should have granted a continuance.

Shepherd v. *State of Florida* (1951), 341 U.S. 50, 71 S. Ct. 549, 95 L. Ed. 740;
Juelich v. *U. S.* (5th Cir. 1954), 214 F. 2d 950;
Delaney v. *U. S.* (1st Cir. 1952), 199 F. 2d 107.

In the dissenting opinion of Justice Duffy of the United States Court of Appeals for the Seventh Circuit in this

cause on remandment, in support of his argument that Petitioner was not given a fair trial, stated at 271 F. 2d 552, 561:

> "When it became apparent that an impartial jury could not be obtained, the motion for a further continuance should have been granted. The majority opinion argues that a further delay might not have been helpful, but, on the other hand, that public opinion might have been aroused by the slowness of the judicial process. The passage of time is a great healer. We have no right to speculate that any subsiding of public prejudice would be offset because our fundamental law insists that a defendant in a criminal case shall have a fair trial."

4.

The trial court in denying Petitioner hearings on his motions for continuance and/or change of venue deprived Petitioner of the right to a fair and impartial trial before a fair and impartial tribunal means nothing if the accused is denied the right to produce evidence to prove actual bias, prejudice and excitement in the community. Due process requires that the accused at least have the opportunity of presenting witnesses and making a record so that a higher court could review the actions of the trial court as to whether or not bias and prejudice did exist.

In Re: Murchison (1955), 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942;
Moore v. *State* (1928), 118 Ohio 494;
State v. *Biggs* (1953), 198 Ore. 413, 255 P. 2d 1055.

5.

Due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States was

denied this Petitioner when the trial court refused to permit Petitioner to introduce evidence, including his own testimony, in support of his objection and offer to prove the involuntary nature of a purported confession prior to its introduction into evidence.

The State of Indiana, in questioning the witness, Dan Hudson, Chief of Detectives, asked the witness:

> "What, if anything did the defendant say to you about the murder of Whitney Wesley Kerr when he talked to you on Tuesday, April 12, 1955?"

The Petitioner at that time objected to the witness answering said question, and at that time offered to prove that the alleged confession was of an involuntary nature, illegally and unlawfully obtained as a result of an illegal and unlawful detention of Petitioner for a period of seven days without granting Petitioner a preliminary hearing, and in violation of the laws of the State of Indiana. That said purported confession was made without Petitioner having had the right to advice of counsel, after long periods of questioning, and without affording Petitioner proper food and rest. Notwithstanding the objection made by Petitioner to the introduction of the purported confession and offer to prove, the trial court permitted the witness to answer the question in the presence of the jury, without affording Petitioner a hearing and an opportunity to question the admissibility of the purported confession.

Carignan v. *U. S.* (1951), 342 U.S. 36, 72 S. Ct. 97, 96 L. Ed. 48.

6.

The prosecuting attorney, during the course of the trial participated in the voir dire examination of the jurors, participated in the examination of the witnesses during

the course of the trial, and during the trial testified as a witness as to a purported confession of the Petitioner. At the close of the evidence, the same prosecuting attorney was then permitted to make a final argument to the jury, and was permitted to comment on his own testimony. Petitioner objected during the course of the trial when said prosecuting attorney testified as a witness and again objected to said prosecuting attorney arguing the case before the jury because of his prior participation as a witness during the course of the trial. It is submitted that said conduct on the part of the prosecuting attorney was unethical and denied Petitioner due process of law as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

Petitioner calls the Court's attention to the remarks of Justice Duffy of the United States Court of Appeals for the Seventh Circuit in reviewing the conduct of the prosecuting attorney in this cause in 271 F. 2d 552, 561, wherein he states:

> "Another reason for the failure of due process in the instant case is that one of the two state prosecuting attorneys who tried the case also acted as a witness on the trial. The majority opinion, while conceding this was error, seems to brush it aside saying: 'However, in this case we cannot adjudicate a question of ethics. * * *' Prosecutor Wever, participated in examining prospective jurors, interposed objections to testimony, and otherwise actively participated in the trial. He then took the stand as a witness and testified concerning a confession made to him. Over objection, he made the closing argument to the jury, commenting on the evidence including his own testimony. Such conduct was in violation of Canon 19 of the Canon of Professional Ethics. Such conduct was offensive to the rights of the defendant to a fair and impartial trial."

In addition to Justice Duffy's remarks, the majority opinion admits to the serious nature of Wever's conduct, but refuse to adjudicate a question of ethics, wherein they state:

"In a forum where the ethics of Wever's conduct is directly brought in issue by the State of Indiana, it is apparent that a charge of unethical conduct on the foregoing facts would be *serious*. However, in this case, *we cannot adjudicate a question of ethics. . . .*" (Our emphasis.)

Canon 19 of the Canons of Professional Ethics of the American Bar Association;

Berger v. *U. S.* (1935), 295 U.S. 78, 55 S. Ct. 629, 79 L. Ed. 1314;

Dissenting Opinion No. 220, Opinions of the Committee on Professional Ethics and Grievances of the American Bar Association.

7.

Petitioner was denied an opportunity to prove actual bias and prejudice on the part of certain jurors who served in this case. During the voir dire examination Petitioner's attorney made certain challenges to these jurors and offered to prove that said jurors were biased and prejudiced. The trial court denied Petitioner the right and opportunity to introduce evidence in support of said offer to prove. Petitioner's offer to prove being uncontradicted, must be taken as true, and in the light of the due process clause of the Fourteenth Amendment to the Constitution of the United States, these jurors were incompetent to serve, and Petitioner was thereby denied a fair and impartial trial.

In Re: Murchison (1955), 349 U.S. 133, 75 S. Ct. 623, 99 L. Ed. 942.

ARGUMENT

I.

Petitioner's Constitutional Rights Were Violated by Forcing Him to Trial Before a Jury Composed of Jurors With a Preconceived Opinion That He Was Guilty.

Justice Duffy of the United States Court of Appeals for the Seventh Circuit, in that Court's original opinion herein, accurately summarized Petitioner's position herein with regard to those jurors who served in Petitioner's cause and who were of the preconceived opinion that Petitioner was guilty when he said:

> "Irvin was not accorded due process of law in the trial which resulted in his conviction and death sentence. In my judgment, he did not receive a fair trial because some of the jury had preconceived opinions as to defendant's guilt . . .
>
> "More than half of the jurors who sat in the case had preconceived ideas that defendant was guilty of the offense charged. Some testified on the voir dire that it would take evidence to change that opinion. Defendant exhausted his 20 peremptory challenges, and motion for continuance had been denied.
>
> ". . . the jury, as finally constituted, in my opinion, was not impartial."
>
> Duffy, Chief Judge (7th Cir. 1958), in *Irvin* v. *Dowd*, 251 F. 2d 548.

Justice Duffy reiterated this opinion in this cause on remandment, 271 F. 2d 552, 561 when he stated:

> ". . . but I am, nevertheless, forced to the conclusion that the jury, as finally constituted, was not im-

partial. Possibly it was as impartial a jury as could have been found in Gibson County on that date, but that was not sufficient. That did not insure due process."

The right to a fair trial is protected by the due process clause of the 14th Amendment to the Constitution of the United States. *Chambers* v. *Florida* (1939), 209 U.S. 227; 60 S. Ct. 472, 84 L. Ed. 715; *Moore* v. *Dempsey* (1922), 261 U.S. 86; 43 S. Ct. 265, 67 L. Ed. 543.

> "'Every procedure which would offer a possible temptation to the average man as a judge . . . not to hold the balance nice, clear and true between the state and the accused, denies the latter due process of law.'"
>
> *In Re: Murchison* (1955), 349 U.S. 133, 136, 75 S. Ct. 623, 99 L. Ed. 942;
>
> *Tumey* v. *State of Ohio* (1927), 273 U.S. 510, 532, 47 S. Ct. 437, 71 L. Ed. 749.

Failure to afford the accused a fair and impartial jury denies the accused a fair and impartial trial as guaranteed by the 14th Amendment to the Constitution of the United States.

A conviction obtained in such instance is illegal and void, and violates due process of law under the 14th Amendment. Through the use of the writ of habeas corpus the accused may seek relief in the courts for alleviating this wrong.

> *Baker* v. *Hudspeth* (10th Cir. 1942), 129 F. 2d 779, 781.

The United States Court of Appeals for the 5th Circuit in *Juelich* v. *U. S.* (5th Cir. 1954), 214 F. 2d 950, 955, was presented with almost the identical questions now presented to this Honorable Court. The Court in that case held that

due process of law was violated by forcing the defendant to trial before a jury composed of jurors, every one of whom had sworn upon his voir dire examination that he had formed an opinion that the defendant was guilty. The Court stated in substance the trial court should have either sustained the defendant's motion to change the venue, or in the alternative have granted a continuance until such time as a fair and impartial jury could have been selected. (Defendant-Appellant's motions for continuance and change of venue were denied.)

A juror's mind should be free of any preconceived opinion as to the guilt or innocence of the accused or of the material facts and circumstances involved in the cause. *Fahnestock* v. *State* (1864), 23 Ind. 231, 236; *Woods* v. *State* (1892), 134 Ind. 35, 40, 33 N.E. 901.

That certain of the jurors, as disclosed by the record, stated that they could disregard their preconceived opinions, indicates a recklessness of judgment and a state of mind less prepared to receive and allow a fair and impartial trial. *Scribner* v. *State* (1910), 30 Okla. Crim. 601; *People* v. *Barker* (1886), 60 Mich. 277; *State* v. *Huffman* (1931), 89 Mont. 194; *State* v. *Joiner* (1927), 163 La. 609, 112 So. 503.

It is obvious that when a prospective juror has already indicated to the court and/or counsel for either side, that he has a preconceived opinion as to the defendant's guilt, and upon questioning, evidences a biased and preconceived opinion unfavorable to the accused, the state, acting through its prosecuting attorney, in objecting to the defendant's challenge, acts to place a juror in an uncomfortable situation and unfavorable light. By psychological technique and pressure the court and prosecuting attorney attempt to make a prospective juror admit, not that he can lay aside the opinion completely, but that he will be fair and impar-

tial, and that the juror does not have a dishonorable feeling towards the accused. No man wishing to admit to dishonor before his fellow men, and the natural impulse being to defend one's integrity in open court, brings forth answers which should be given little credence or weight in view of the fact that most jurors afford greater respect to the prosecuting attorney and the court than to the defense counsel. *State* v. *Joiner* (1927), 163 La. 609, 112 S. 503, 505.

An interesting and enlightening comparison can readily be shown by the answers given during the voir dire examination of the jurors selected in *Juelich* v. *U. S.*, 214 F. 2d 950, 952, 953, and the answers given by jurors selected to serve in *State of Indiana* v. *Irvin* herein. Pertinent portions of the voir dire examination in Petitioner's cause are set out in this brief at pages 18-59.

Another interesting comparison can be made between the instant case and the *Juelich* case. From the *Juelich* record, it appears that 81 jurors composed the panel. Of these, 10 were excused, 51 testified that defendant was engaged in killing the officer, 12 were of the opinion that either the defendant or another had killed the officer, and 2 were of the opinion that Juelich was the guilty person, while 6 had no opinion. The statistics in the *Irvin* case herein reveal the following: 269 persons were successfully challenged for cause for fixed opinions concerning defendant-appellant's guilt; 103 persons were excused because of conscientious objections to the imposition of the death penalty; the Petitioner exercised and exhausted his 20 peremptory challenges; the State of Indiana exercised 10 peremptory challenges; 12 jurors and 2 alternate jurors were selected to serve; the remaining 15 persons were excused because of: deafness, 10; not a freeholder, 1; relative of Irvin, 1; attending funeral, 1; doctor's orders, 1; moved out of county, 1.

The total number of jurors thus interrogated was 431. The percentage of the persons in the community who were of the opinion that the defendant-appellant was guilty among those jurors interviewed soars higher, when it is considered that numbers of those who were excused because of conscientious objection to the imposition of the death penalty also had an opinion as to the guilt of the accused.

A juror's statement that he could set aside his preconceived opinion and thus become a fair and impartial juror is the mere statement of an opinion, and not of a fact, whereas the statement that he had a preconceived opinion is one of fact. *Lingafelter* v. *Moore* (1917), 95 Ohio 384, 117 N.E. 16, 17.

There is nothing in the record as to any juror who served that would indicate to the court that the later statement that the juror could act fairly and impartially is a statement more worthy of belief than the earlier statement that he could not act fairly and impartially. See *Johnson* v. *Reynolds* (1929), 97 Fla. 591, 121 So. 793, 796.

At first blush it appears that certain jurors may have made contradictory statements. Logically, however, it must be assumed that the juror is not actually taking a contradictory position. He can, on the one hand have an opinion, and if the evidence is diametrically opposed, disregard the opinion with hesitancy; but if the evidence meets the preconceived opinion, his mind is put at rest, and in good conscience he can justify his former opinion by saying he was fair and impartial, but the evidence was there just as he had expected.

In a capital case, such as the within cause, with human life depending upon the final outcome, the jury is presented with two questions;

FIRST: Has the defendant's guilt been established beyond a reasonable doubt?

SECOND: Is the penalty to be life imprisonment, or is the death penalty to be imposed?

It is of vital importance to the rights of the defendant that each of these questions be answered free from any bias, prejudice or pressure from the community as a whole. *People* v. *McKay* (1951), 37 Cal. 2d 792, 236 P. 2d 145, 150.

In defendant-appellant's cause, he was charged with the murder of one Whitney Wesley Kerr. Newspapers, admittedly read by the jurors who served, referred to defendant-appellant as the confessed killer of six persons (Example, Tr. p. 79). The record is void of any evidence as to any other homicide. Thus, can one positively say that the result reached would not have been different if the defendant had been tried before jurors lacking the preconceived opinions expressed by them under oath, and void of the purported facts obtained from reading newspapers, listening to the radio and watching television?

The Federal courts, in determining whether or not defendant-appellant's liberty is being restrained in violation of the due process clause of the 14th Amendment to the Constitution of the United States, must determine whether or not the trial court acted arbitrarily and abused its discretion in overruling defendant-appellant's challenges for cause to those jurors who were of the preconceived opinion as to his guilt of the crime for which he was being tried. The question of the qualification of a juror is always a question to be decided by the reviewing courts. The trial court errs in permitting the juror himself to determine his qualifications. It is the discretion that has been exercised by the trial court that determines whether or not defendant-appellant is being illegally detained. *Juelich* v. *U. S.*

(5th Cir. 1954), 214 F. 2d 950; *Theobald* v. *St. Louis Transit Co.* (1905), 191 Mo. 395, 90 S.W. 354.

In addition to the jurors who admit that they had a preconceived opinion as to defendant-appellant's guilt, Juror Ernest Hensley testified in response to questions propounded him during the voir dire examination as follows:

> "Q. Then you would presume, then, starting out on this trial, that the defendant was guilty until you heard evidence from him or from someone on his behalf of his innocence?
>
> "A. Yes, sir.
>
> . . . . . .
>
> "Q. So, in this particular case you would not enter into this matter and give the defendant the benefit of the doubt that he is innocent?
>
> "A. That's right.
>
> "Q. And, under those circumstances, it would be rather impracticable for you to render a fair and impartial verdict based solely upon the evidence?
>
> "A. That's right" (Tr. pp. 3658-3659).

Johnson v. *Reynolds* (1929), 97 Fla. 591, 121 So. 793, 796 holds such a juror is incompetent.

Impartiality is not a technical conception. It is a state of mind. *U. S.* v. *Wood* (1936), 229 U.S. 123, 57 S. Ct. 177, 81 L. Ed. 78.

Constitutional right to a fair and impartial jury requires that every member of the jury must be fair and impartial towards the accused. *Lane* v. *State* (1925), 168 Ark. 528; *Coughlin* v. *People* (1893), 144 Ill. 140; 57 C.J.S. (Juries) Sec. 226a.

The burden of establishing the incompetency of a juror is not upon the defendant. In fact, the burden of proof rests upon the state to establish that a juror will be fair and impartial towards the accused, and any doubt as to the juror's competency should be resolved in favor of the accused. *In Re: Murchison* (1955), 349 U.S. 133, 75 S. Ct. 623; 99 L. Ed. 942; *Thompson* v. *Commonwealth* (1952), 193 Va. 704, 70 S.E. 2d 284. Thus, the jurors selected in Petitioner's cause were incompetent and their presence on the jury denied defendant-appellant due process of law as guaranteed by the 14th Amendment to the Constitution of the United States.

II.

Denial of Petitioner's Application for a Change of Venue Based Upon Bias and Prejudice in the Community in Which Trial Was Being Held Denied Petitioner Due Process of Law and the Application of Burns Indiana Statutes, Sec. 9-1305 Violates Due Process.

Burns Indiana Statutes, 1956 Replacement, Section 9-1305, Volume 4, Part 1, p. 157 provides:

> "When affidavits for a change of venue are founded upon excitement or prejudice in the county against the defendant, the court * * * in all cases punishable by death, shall grant a change of venue to the most convenient county. * * * Provided, however, that only one (1) change of venue from the Judge and only one (1) change from the county shall be granted."

Petitioner filed three verified motions and affidavits for change of venue from Gibson County, Indiana. The first was filed on October 29, 1955 (Tr. p. 57), the second was filed November 14, 1955 (Tr. p. 127), and the third was filed

December 7, 1955 (Tr. pp. 297-298). Each motion was overruled by the trial court without granting defendant-appellant a hearing as prayed for by said motions, as shown by the transcript, at pages 57, 128, 129 and 284. The basis for the trial court's ruling can be found in the order book entry of the Gibson Circuit Court for the 29th day of October, 1955 (Tr. pp. 56-57). Quoting from the order book entry at page 57:

> "And now the defendant files his motion and affidavit for change of venue from the county, and the court having judicial knowledge that this case is in this court on a change of venue from the Vanderburgh Circuit Court granted on the petition of the defendant, all as shown by the transcript in this cause now overrules said motion and affidavit for change of venue from Gibson County, Indiana. * * *"

A change of venue should be granted where a community is biased and prejudiced against the defendant. *Shepherd* v. *State of Florida* (1951), 341 U.S. 50, 71 S. Ct. 549, 95 L. Ed. 740; *Juelich* v. *U. S.* (5th Cir. 1954), 214 F. 2d 950; *People* v. *McKay* (1951), 37 Cal. 2d 792, 236 P. 2d 145.

The Indiana Supreme Court, although denying a second change of venue in *State ex rel. Fox* v. *LaPorte Circuit Court*, 1957, 236 Ind. 69, 138 N.E. 2d 875, two judges of the majority of three based their opinion upon the point that no attempt had been made as of the date of the decision to obtain a jury in the county of venue. The dissenting opinion of Judge Emmert, commencing at page 884, argued that the fact that the trial judge had found bias and prejudice in the community to be existent, the denial of the second change of venue would be in violation of the due process clause of the 14th Amendment to the Constitution of the United States. It was not too surprising that thereafter, a

second change of venue in the *Fox* case, *supra* was granted to the defendant, Robert Johnson, by the trial court upon the joint motion of the defendant and the State, and thereafter approved by the Indiana Supreme Court in *State ex rel. Gannon* v. *Porter Circuit Court*, 1959, —— Ind. ——, 159 N.E. 2d 713. It was Judge Achor, the author of the concurring opinion in *State ex rel. Fox* v. *LaPorte Circuit Court, supra,* who wrote the majority opinion approving a second change of venue in the same case where because of continued and additional publicity, another change of venue was filed, alleging that an impartial jury could not be selected in LaPorte County, Indiana, which facts were admitted by the prosecuting attorney. The Indiana Supreme Court, in reviewing the case of *State ex rel. Fox, supra,* and in refusing to apply the provisions of Burns Indiana Statutes Annotated, Section 9-1305, *supra,* in effect overruled *State ex rel. Fox* v. *LaPorte Circuit Court, supra,* and held same inapplicable where the defendant could not have a fair and impartial trial in the community because of bias and prejudice against the defendant.

The Court of Appeals for the Seventh Circuit lays great stress upon the impartiality of the trial judge, but the majority opinion ignores the fact that the trial judge was not the *trier of fact.*

Due process of law requires that the trier of fact be free of any bias or prejudice against the defendant, regardless of the personal opinion of the trial judge, who under our procedure is not permitted to comment upon the evidence or to express in any way his personal views as to the guilt or innocence of defendant.

It would be difficult to find a holding more prejudicial to the rights of an accused as guaranteed by the 14th Amendment to the Constitution of the United States, than the holding in *State ex rel. Fox, supra.* Judge Bobbitt, speaking for the majority, stated at 138 N.E. 2d 875, 880,

that the Indiana Constitution, which guarantees trial by an impartial jury, cannot be construed to mean "that the accused may have a trial by an impartial jury in a county adjoining that in which the offense was committed," but the right is limited to those counties where the offense is actually committed. And in the same opinion, he wrote: "There is no question of weighing the evidence presented in the hearing on a motion for change of venue from La-Porte County involved in this case."

It is with this same erroneous thinking that the Court of Appeals has erred in the instant case, and that Court has ignored the fact that this Petitioner was denied a hearing of any kind on his motions, both for a change of venue and for a continuance, and therefore it made no difference to the trial judge what the evidence would have been had he afforded this Petitioner a hearing, for standing on the statute alone, he denied the motions. Certainly, it is not too much to ask of a trial court that in affording a fair and impartial trial to an accused as guaranteed by the 14th Amendment to the Constitution of the United States, that he give the accused an opportunity to present the facts at a hearing, and based upon those facts, to render a decision. And as in this case, where day after day, prospective jurors expressed the opinion that this Petitioner was guilty (samples of their answers given on the voir dire being set out in this brief), there remained in the jury box a jury composed of over half in number who were of the opinion that this Petitioner was guilty of the offense for which he was being tried.

The trial judge, under these circumstances, had only two choices: To grant Petitioner's motion for continuance, or to grant Petitioner's motion for change of venue from the county.

III.

The Overruling of Petitioner's Motions for Continuance Based Upon the Bias and Prejudice in the Community Constituted Denial of Due Process of Law.

The voir dire examination of the 431 prospective jurors called in this case leads to the undeniable conclusion that Gibson County, Indiana, was a biased and prejudiced community with regard to Petitioner on November 14, 1955, when an attempt was made to impanel a jury in this cause. That it required 431 prospective jurors to be called is proof in itself, and the strongest evidence which can be presented in support of a motion for continuance. But in addition to this strong evidence, there was other evidence presented to the court by way of answers to questions propounded to prospective jurors as to whether or not they had formed or expressed an opinion as to Petitioner's guilt.

Petitioner filed several motions for continuances, including a motion filed on the 14th day of November, 1955 (Tr. p. 130). Additional verified motions for continuance were filed on November 15, 1955 (Tr. p. 155), on November 16, 1955 (Tr. p. 162), on November 17, 1955 (Tr. p. 171), on November 18, 1955 (Tr. p. 173), on November 21, 1955 (Tr. p. 187), on November 22, 1955 (Tr. p. 201), and the final motion on December 5, 1955 (Tr. p. 243).

Each motion was overruled as shown by the record, Transcript pages 127, 154, 161, 170, 178, 187, 200 and 242. By each motion Petitioner prayed for a hearing in order to introduce evidence in support of the allegations contained therein, that he could not have a fair and impartial trial in Gibson County, Indiana, because of the bias and prejudice then existent in said community against Petitioner. The verified motions for continuance stand undenied by the

record in the proceedings in the Gibson Circuit Court. No answer was ever filed to any of said motions and no hearing held on any of said motions. Prosecuting Attorney Paul B. Wever openly admitted on the outside of the court room, however, the great difficulty encountered in obtaining a jury because of the bias and prejudice against the Petitioner. In fact, during the course of the proceedings below, he appeared on a radio news broadcast on the 22nd day of November, 1955, and while the voir dire examination of prospective jurors was in process (Tr. p. 253)., (Brief pp. 17-18) The prosecuting attorney, during the course of the news broadcast, remarked:

> "I think probably the most unusual thing in this case is the unusual coverage given to the case by the newspapers and radio. This is what has caused us so much trouble in getting a jury of people who are not unbiased and unprejudiced in the case" (Tr. p. 253).

And in response to the question:

> "You mean the coverage of the thing that has gone on before the actual trial?"

Prosecutor Wever replied:

> "That is right" (Tr. p. 253).

The answers of prospective jurors during their voir dire examination are equally strong evidence of the bias and prejudice which then existed. Excerpts from testimony on voir dire examination of various prospective jurors are:

Prospective Juror Williams:

> "The opinion I have expressed was that he was guilty" (Tr. p. 3822).

Prospective Juror Coleman expressed an opinion that the defendant was guilty (Tr. p. 3831).

Prospective Juror Edwards:

"Well, from what I have heard it would still be the death penalty" (Tr. p. 3921).

Prospective Juror Yarbor:

"I don't believe there would be enough to remove it in my mind" (Tr. p. 3966).

Prospective Juror Clem:

"I believe the guilty finger points at him" (Tr. p. 4156).

Prospective Juror Bates:

"I think he is guilty" (Tr. p. 4186). "It would require a whole lot of evidence to remove my opinion" (Tr. p. 4187).

Prospective Juror Bammer:

"Q. Whether or not you have formed or expressed an opinion as to defendant's guilt or innocence?

"A. Yes, sir, I have (Tr. p. 4238). I don't think you could get enough evidence to remove my opinion" (Tr. p. 4239).

Prospective Juror Schlotman:

"I have got my mind already made up" (Tr. p. 4276).

Prospective Juror Brown:

"Q. Whether or not you have formed an opinion as to the defendant's guilt or innocence?

"A. Yes, sir" (Tr. p. 4287). "It would have to be awful good evidence to remove my opinion" (Tr. p. 4289).

Prospective Juror Baize:

"I absolutely have an opinion" (Tr. p. 4380).

Prospective Juror Ben Gries:

"They ought to take him out and do what he had been doing" (Tr. p. 2179).

Prospective Juror Hipp:

"Well, the evidence too. After you kill one man, you don't have to kill again, do you" (Tr. p. 2205)?

Prospective Juror Hulfacher:

"Yes, sir, it is a fixed opinion. Yes, sir, I believe he's guilty and don't believe we need them kind of people around" (Tr. p. 2280).

Prospective Juror Fella:

"Based upon just taking him out and hanging him, I believe" (Tr. p. 2582).

Prospective Juror Walters:

"Well, the first reason was he confessed, and the second reason was if he wasn't guilty the policemen wouldn't give up the search for the guilty man. Another reason is there has been no more killings like this" (Tr. p. 2461).

Prospective Juror Faust:

"I think he is guilty, from what I've formed my opinion" (Tr. p. 3493).

Prospective Juror Wolfe:

"Well, that's the way I feel about that. If a man is guilty of murder, the death penalty is the worst, I

think he could get and I think he would be lucky if he got anything lighter, and if the man was guilty of murder, in my opinion he should have the works" (Tr. pp. 2259-60).

These examples taken from the voir dire examination are indicative of the attitude and atmosphere which prevailed during the voir dire examination and during the course of the trial. The voir dire examination covers the greatest portion of the transcript in said cause on appeal to the Supreme Court of Indiana, which Petitioner introduced in evidence without objection at the hearing on his petition for writ of habeas corpus in the Northern District Court of Indiana, South Bend Division. The voir dire examination covers pages 1979 to 4762 inclusive of the transcript.

In *Juelich* v. *U. S.* (5th Cir. 1954), 214 F. 2d 950, the Court was of the opinion that where large numbers of prospective jurors and jurors were of the preconceived opinion as to defendant's guilt, a continuance should have been granted.

The Indiana Supreme Court in an opinion by Judge Gilkison, took the position that a continuance should be granted where prejudicial newspaper stories have been disseminated prior to trial and it appears reasonably probable that a defendant will be prejudiced by the denial of a continuance. *Liese* v. *State* (1954), 233 Ind. 536, 122 N.E. 2d 731, 732.

Judge Parkinson in *Irvin* v. *Dowd* (1957), 153 Fed. Supp. 531, 536, recognized that at the time of the hearing on Petitioner's petition for writ of habeas corpus on July 5, 1957 at South Bend, Indiana, the proceedings connected with Petitioner's case continued to have state-wide publicity. Petitioner most earnestly takes issue, however, with Judge Parkinson's statement with reference to the publicity attendant to Petitioner's cause, wherein he stated:

> "* * * It therefore made no difference where or when the petitioner had been tried. It would have been the same."

It is significant that Judge Parkinson, sitting at the hearing on Petitioner's petition for writ of habeas corpus, some 275 miles from the City of Princeton, in Gibson County, Indiana, where the trial of Petitioner's cause was held, made the finding of fact that "It therefore made no difference where or when the Petitioner had been tried. It would have been the same."

And likewise, Chief Justice Duffy's concurring opinion in *Irvin* v. *Dowd, supra,* at page 554, wherein he stated:

> "Probably it was as impartial as could be found in Gibson County on that date, but that was not sufficient to insure due process."

It is no consolation to Leslie Irvin for the courts of the United States to say in effect: "We are sorry, but there was no place in Indiana where you could have had a fair trial. The news media created a situation about which we, the courts, can do nothing." Petitioner here urges that the courts have a concurrent obligation to the accused to protect the accused, and require that news media be controlled in their efforts towards "Trial by Press" prior to trial. The courts should not shirk their responsibility towards the accused in this regard.

The Supreme Court of the United States has at all times attempted to protect the right of newspapers to make and publish comments either "vitriolic," "scurrilous" or "erroneous" concerning pending litigation, without thereby risking conviction for contempt of court, *Bridges* v. *California* (1941), 314 U.S. 252, 62 S. Ct. 190, 86 L. Ed. 192; *Pennekamp* v. *Florida* (1946), 328 U.S. 331, 66 S. Ct. 1029, 90 L. Ed.

1295; *Craig* v. *Harney* (1947), 331 U.S. 367, 67 S. Ct. 1249, 91 L. Ed. 1546, and even in these extreme cases, this has been a divided Court.

The Supreme Court of the United States having guaranteed Constitutional protection for the press to report and comment on pending litigation, it is important now that this Court recognize and re-affirm the correlative constitutional right of individuals charged with crime to be protected from the results of the abuse of that power referred to as Freedom of the Press. The concept of due process of law concerns itself most dearly with the rights of an accused to a fair and impartial trial. This Court must now recognize the media of mass communication, in the exercise of their fundamental freedom to disseminate the news, can infringe upon the rights of an accused in a criminal cause, preventing a fair and impartial trial.

Under our American system of law, there is no way that the courts can silence newspapers, radio and television and their treatment of criminal causes in the absence of a "serious and imminent threat to the administration of justice." *Craig* v. *Harney* (1947), *supra*, 67 S. Ct. 1249, 1253.

But this should not mean that the press, radio and television, unimpeded by any restraint, should have the right to try a defendant in the news media by evidence, pictures, confessions, prosecutor's statements, etc. without affording some protection to the defendant, who is in custody and unable to counteract or gain equal space to answer or counteract trial by newspaper.

In *Shepherd, et al.* v. *State of Florida* (1951), 341 U.S. 50, 71 S. Ct. 549, 550, 95 L. Ed. 740, Justices Jackson and Frankfurter recognized the possibility of a newspaper preventing a defendant from having a fair and impartial trial by reason of their published reports, and stated:

"It is hard to imagine a more prejudicial influence than a press release by the officer of the court charged with defendants' custody stating that they had confessed, and here just such a statement, unsworn to, unseen, uncross-examined and uncontradicted, was conveyed by the press to the jury.

"* * * But if freedoms of press are so abused as to make fair trial in the locality impossible, the judicial process must be protected by removing the trial to a forum beyond its probable influence. Newspapers, in the enjoyment of their constitutional rights, may not deprive accused persons of their right to fair trial. These convictions, accompanied by such events, do not meet any civilized conception of due process of law."

In *Stroble* v. *California* (1952), 343 U.S. 181, 72 S. Ct. 599, 609, 96 L. Ed. 529, Justice Frankfurter criticizes inflammatory pre-trial releases by a prosecutor. In view of Prosecuting Attorney Wever's active participation in the selection of the jury, examination of witnesses and in presenting final arguments to the jury, his conduct prior to the trial becomes all the more important and significant, for it is the newspaper articles which carried stories and quotes from Mr. Wever that are partially the basis for the disqualification of large numbers of jurors and for the disqualification of the jurors urged in this brief. Quoting from Mr. Justice Frankfurter's opinion in the *Stroble* case:

"And so I cannot agree to uphold a conviction which affirmatively treats newspaper participation instigated by the prosecutor as part of 'the traditional concept of the "American way of the conduct of a trial".' Such passion as the newspapers stirred in this case can be explained (apart from mere commercial exploitation of revolting crime) only as want of confidence in the

orderly course of justice. To allow such use of the press by the prosecution as the California court here left undisciplined, implies either that the ascertainment of guilt cannot be left to the established processes of law or impatience with those calmer aspects of the judicial process which may not satisfy the natural, primitive popular revulsion against horrible crime but do vindicate the sober second thoughts of a community. If guilt here is clear, the dignity of the law would be best enhanced by establishing that guilt wholly through the processes of law unaided by the infusion of extraneous passion. The moral health of the community is strengthened by according even the most miserable and pathetic criminal those rights which the Constitution has designed for all."

In the *Stroble* case this Court failed to find sufficient evidence to substantiate the claim that newspaper accounts of the murder for which the defendant was tried or newspaper accounts of his confession had aroused the community against said defendant to such an extent as to prevent a fair trial in violation of the due process clause of the 14th Amendment. There are some clearly defined distinctions between the within cause and the *Stroble* case. In the *Stroble* case there were no motions for continuance or change of venue; the defendant did not exhaust his peremptory challenges, and the confession printed in the newspaper was a public record as a result of the preliminary hearing conducted prior to trial, and finally the record fails to disclose that any of the jurors in that case had read or otherwise discussed the newspaper articles.

And again, the Court in dealing with this question in *United States* v. *Handy* (1956), 351 U.S. 454, 76 S. Ct. 965, 970, 100 L. Ed. 1331, found it significant that the petitioner in a habeas corpus proceeding, although represented by

competent counsel, did not use all of his peremptory challenges, did not seek a continuance of the trial, or a change of venue. Although not holding the failure to exercise these means controlling, the Court did deem the failure to exercise them significant. Citing *Stroble* v. *California, supra.*

In *U. S.* v. *Handy, supra,* in 76 S. Ct. 965, 973, Justice Harlan dissented, with Justices Frankfurter and Douglas joining. They would hold that due process was violated because a small rural community was outraged over the atrociousness of the crime charged, and in a capital case, the actions and comments outside the court room by a disqualified trial judge, and in his making his presence known in the court room during the course of the trial, might easily have been representative of the feelings of the community, and of vital importance to those jurors who fixed the penalty of death. This, in the opinion of Justices Harlan, Frankfurter and Douglas, was sufficient to have warranted the granting of a writ of habeas corpus.

In *State of Maryland* v. *Baltimore Radio Show* (1950), 338 U.S. 912, 70 S. Ct. 252, 255, 94 L. Ed. 255, Justice Frankfurter in an opinion regarding the Supreme Court's denial of the petition for writ of certiorari to review a decision of the Court of Appeals, reviewing a conviction of a radio station operator for contempt of court for publishing the gruesome details of the murder of a little girl in a park, prior to the trial, said:

> "The issues considered by the Court of Appeals bear on some of the basic problems of a democratic society. Freedom of the press, properly conceived, is basic to our constitutional system. Safeguards for the fair administration of criminal justice are enshrined in our Bill of Rights. Respect for both of these indispensable elements of our constitutional system presents some of the most difficult and delicate problems for

adjudication. It has taken centuries of struggle to evolve our system for bringing the guilty to book, protecting the innocent, and maintaining the interests of society consonant with our democratic professions. One of the demands of a democratic society is that the public should know what goes on in courts by being told by the press what happens there, to the end that the public may judge whether our system of criminal justice is fair and right. On the other hand our society has set apart court and jury as the tribunal for determining guilt or innocence on the basis of evidence adduced in court, so far as it is humanly possible. It would be the grossest perversion of all that Mr. Justice Holmes represents to suggest that it is also true of the thought behind a criminal charge. * * * that the best test of truth is the power of the thought to get itself accepted in the competition of the market. Abrams v. United States, 250 U.S. 616, 630, 40 S. Ct. 17, 22, 63 L. Ed. 1173. Proceedings for the determination of guilt or innocence in open court before a jury are not in competition with any other means for establishing the charge."

Attached to Justice Frankfurter's opinion are numerous nglish decisions, wherein the English courts were con-rned with the contemptuous nature of published articles rejudicial to the fair administration of criminal justice. lthough admittedly these cases are not controlling in this untry, they are fundamental to the question here pre-nted.

The American Bar Association has recognized the seri-sness of the problem presented to the courts by trial press. *See Report of the Special Committee on Coop-ation Between the Press, Radio and Bar, as to publicity*

interfering with fair trial of judicial and quasi-judicial pr ceedings.

62 A.B.A. Rep. 851 (1937).

In *Delaney v. U. S.* (1952) (1st Cir.), 199 F. 2d 107, A.L.R. 2d 1300, a former internal revenue officer w charged with receiving payments with the intent of havi his official actions and decisions influenced and with maki false certificates of discharge of tax liens. While und indictment, and awaiting trial for the alleged offenses, t King Congressional Committee conducted highly publiciz hearings in Boston, where the trial was to be held. Defe dant's motions for continuance of the trial were denie The United States Court of Appeals for the First Circu in an opinion by Chief Justice Magruder, held that t damaging publicity resulting from the hearing constitute grounds for continuance of the trial until its prejudici effect had had an opportunity to wear off. Contrary to t *Handy* and *Stroble* cases, the Court held that defendant right to a continuance was not waived by the defendant failure to avail himself of the right to a change of ven or to exhaust his peremptory challenges during the voi dire examination. Justice Magruder, in commenting upo the average juror's inability to overcome the prejudici effects of such intense publicity said:

> "One cannot assume that the average juror is s endowed with a sense of detachment, so clear in hi introspective perception of his own mental processe that he may confidently exclude even the unconsciou influence of his preconception as to probable guilt, e gendered by pervasive pretrial publicity."

And the Court was unwilling to follow the fatalistic ac ceptance of "trial by newspaper" as being "an unavoidabl curse of metropolitan living (like, I suppose, crowded sub

ways)" as advanced by Justice Frank's dissenting opinion in *U. S. v. Leviton* (2nd Cir. 1951), 193 F. 2d 848, 865.

In most cases which have dealt with the continuance-due process question as presented here, there has been an absence of a concrete showing by the appealing party of bias and prejudice on the part of the jurors who served, or a complete absence of any evidence that the jurors selected had read or heard anything about the particular case in the newspapers and from the radio and television reports, to form the foundation for community bias and prejudice complained of. However, in the instant case, counsel for Petitioner were able to establish throughout the voir dire examination that the jurors, over an extended period of time had read the articles concerning Petitioner as published by the Evansville Courier and the Evansville Press, as well as those articles printed by the Princeton Clarion-Democrat and reports they had heard over the Evansville radio and television stations. The evidence as presented by Petitioner's motions for continuance was that over an extended period of time, including immediately prior to the trial, these newspapers had carried front page stories concerning Petitioner and made reference to him as "the confessed killer of 6 persons." It is submitted that the evidence in this cause clearly establishes actual bias and prejudice in Gibson County, Indiana, where Petitioner's trial was held, and among prospective jurors called in said cause, and jurors who actually served, on account of the newspaper, radio and television reports, to such an extent that Petitioner-Appellant has been deprived of a fair and impartial trial as guaranteed by the due process clause of the 14th Amendment to the Constitution of the United States. Even though a decision such as this is a matter of degree, under this evidence this Court can only conclude that due process has not been afforded Petitioner. Cf.

Moore v. *Dempsey* (1923), 261 U.S. 86, 43 S. Ct. 263, 67 L. Ed. 543.

Attached to each of Petitioner's motions for continuance were sample articles, and by no means all of the articles published by the aforementioned newspapers concerning Petitioner and indicating his guilt.

The news articles covering the killing of Whitney Wesley Kerr commenced in December of 1954. However, until April 8, 1955, the date petitioner was arrested, Petitioner's name was in no way ever linked with the slaying. Although under arrest on April 8, 9 and 10th, 1955, the first news article of significance herein appeared on Monday morning, April 11, 1955, when the Evansville Courier in headlines stated (Tr. p. 67):

"MURDER SUSPECT FACES LIE TEST TODAY"

"HELD INCOGNITO AS PAROLE VIOLATOR"

Subsequently the Evansville Courier printed these headlines (Tr. p. 68):

"POLICE PRESS PROBE OF MURDER SUSPECT"

"IRVIN REGARDED AS HOT LEAD AFTER LIE TEST"

"State Police Mum on Full Report, but Confessed Burglar's Clothes Sent to Lab in Duncan Slayings"

Likewise, the Evansville Press (Tr. p. 70) in headlines stated:

"IRVIN PLACED AT MURDER SCENE: REPORTED SEEKING TO MAKE DEAL"

"CAR SEEN TURNING INTO DUNCAN LANE"

And in the Evansville Courier (Tr. p. 72):

"IRWIN, GRILLED
IN MURDERS, TO
TALK TO WEVER"

"Parolee, Suspected in Area
Slayings, to Confer with
Prosecutor at 9 A.M. Today"

And in headlines 2⅜ inches high, the Evansville Courier blasted across the front page (Tr. p. 73):

"SIX MURDERS SOLVED!"

"REPORT DETAILS
OF HOW KILLINGS
WERE EXECUTED"

"POLICE CHARGE IRVIN
WITH KERR SLAYING:
IMPLICATED IN OTHERS"

"Prosecutor to Ask for Grand Jury
Action Today: Ex-Convict Still
Refuses to Write Out Confession"

Our Comment: Following these headlines, the entire front page of this newspaper was devoted to details of how each of six deceased persons were purported to have been murdered by Petitioner.

The Evansville Press, on April 14, 1955 (Tr. p. 74) in headlines stated:

"GRAND JURY CALLED
IN IRVIN CONFESSION"

"TRUCKER SOUGHT
TO IDENTIFY SLAYER"

"Admitted Killer of Six Area Persons
Spends 25 Minutes Talking with Priest"

The Evansville Press, on April 14, 1955 (Tr. p. 76) posed the question in headlines:

"WHAT MADE IRVIN A KILLER?"

And the Evansville Press on the same date related the details of the story of six murders (Tr. p. 77).

Also in the Evansville Press (Tr. p. 78) these headlines:

"BURGLARIES WOVE
NET AROUND IRVIN"

The Evansville Courier again on April 15, 1955 (Tr. p. 79) came out with headlines:

"MASS-KILLER LESLIE IRVIN BARES DETAILS OF SIX AREA SLAYINGS TO LOCAL POLICE"

"CONFESSIONS END
SIX-DAY SILENCE"

Subsequent significant headlines were as follows:

"NO IRVIN DEAL,
WE ASK DEATH,
ASSERTS WEVER"
(Tr. p. 80)

"IRVIN INDICTED ON TWO MURDER CHARGES"
(Tr. p. 93)

"TWO DOCTORS
DECLINE TASK
TESTING IRVIN"
(Tr. p. 101)

"DOCTORS SAY IRVIN CAN STAND TRIAL"
(Tr. p. 103)

"IRVIN SANE;
FACES TRIAL"
(Tr. p. 105)

The Evansville Press went so far as to print the following comment (Tr. p. 92):

"Mr. Hayes' appointment as counsel for Irvin is mandatory and he had no choice but to accept.

"Mr. Hayes disclosed today he has received much criticism over being Irvin's counsel. He pointed out that not only must the public defender represent all persons for whom the court appoints him, but the law requires that every person charged with a felony must have an attorney if he wants one.

"An Attorney is subject to disbarment for refusing to represent an accused, he added."

On Transcript p. 97, in referring to defendant's plea of not guilty, the Evansville Press had this to say:

"Leslie Irvin, who has admitted to police that he shot six persons to death to cover up three petty robberies, pleaded innocent."

On the day before trial, the Evansville Courier-Press stated (Tr. p. 135):

"Evansville police say Irvin has orally admitted the Kerr slaying; the robbery-murder of Mrs. Mary Holland; the murder of Mrs. Wilhelmina Sailer in Posey County and the slaughter of three members of the Duncan family in Henderson County, Ky."

On the date of the trial, the Evansville Courier referred to Irvin as an ex-convict who served time in the Indiana penitentiary for burglary (Tr. p. 134).

The Evansville Press in a similar vein stated (Tr. p. 137):

"Although police have no written statement, they said Irvin has already admitted shooting Mr. Kerr, a 29 year old service station attendant, while robbing the station Dec. 23, 1954.

"Irvin, whose Evansville address is 1224 E. John St., also orally admitted the robbery-murder of Mrs. Mary Holland, police said. They said he also admitted the slaying of three members of the Duncan family in Henderson County, Kentucky, and the murder of Mrs. Wilhelmina Sailer, in Posey County."

The Evansville Courier, several days prior to trial stated (Tr. p. 138):

"Police who arrested him say Irvin has confessed to six murders in two states, ranging over a period of four months, and the convicted burglar will go on trial Monday for only one, in Evansville. * * *

"In oral statements given police after his arrest, Irvin said he first slugged Mrs. Holland into unconsciousness, then shot her in the head when she came to and screamed as he was taking money from the store.

Robbed Station

"He said he shot Kerr, attendant at a service station on the corner of U.S. 41 and Franklin Street, and robbed the station after talking with the 20 year old father of three from 10 p.m. to 1 a.m. Dec. 23, 1954.

"'Police say Irvin also has admitted murdering Mrs. Wilhelmina Sailer, a Posey County housewife; Goebel, Raymond and Elizabeth Duncan, all of Henderson County, Ky., and leaving for dead Mrs. Goebel Duncan, whom he shot in the head."

During the voir dire examination, Joe Aaron, Feature writer for the Evansville Courier described the selection of the jury as follows:

"Strong feelings, often bitter and angry, rumbled to the surface Tuesday as the selection of a jury to weigh the fate of Leslie Irvin crawled through its second laborious day" (Tr. p. 166).

Later Mr. Aaron commented:

"The extent to which the multiple murders—three in one family—have aroused feelings throughout this area was emphasized Friday when 27 of the 35 prospective jurors questioned were excused for holding biased pretrial opinions in the case" (Tr. p. 192).

Later he wrote:

"Events preceding the defense motion Monday followed the pattern previously laid down in the trial—a pattern of deep and bitter prejudice against the former pipefitter" (Tr. p. 206).

For the Evansville Press, a well known reporter, Robert Flynn, wrote:

"OUTBURSTS SPARK IRVIN JURY PICKING"

"The outbursts, however, highlighted the difficulties which the defense attorneys, along with the prosecuting attorneys—Prosecutor Paul Wever and Deputy Howard Sandusky from Vanderburgh County, and Prosecutor Loren McGregor, from Gibson County are having" (Tr. p. 176).

At Transcript page 193 he comments upon the spectators as a result of juror's statements, as "my mind is made up" and "I think he is guilty."

And at Transcript page 207 he writes:

"'IMPARTIAL' JURORS ARE HARD TO FIND"

IV.

Denial of Hearing on Motions for Continuance and Change of Venue Constituted Denial of Due Process.

The 14th Amendment to the Constitution of the United States guarantees a defendant in a criminal case a fair trial before a fair tribunal.

> *In Re: Murchison* (1955), 349 U.S. 133, 75 S. Ct. 623, 625, 99 L. Ed. 942.

In the instant case the defendant-appellant, at each and every step of the proceedings was denied a hearing on his verified motions and affidavits for change of venue and for continuance. The record is clear that no answer was ever filed to any of these motions filed on behalf of defendant-appellant; that no hearing was ever held on any of these motions. The guarantee of due process is of no value, if defendant-appellant is denied the opportunity to present evidence in support of his motions for continuance and change of venue, and in fact, the Supreme Court of Ohio in *Moore* v. *State* (1928), 118 Ohio 494, 161 N.E. 532, 533, in holding that due process required that the affidavit of prejudice made against a presiding judge in a criminal case, required the judge to hold a hearing and permit the defendant to make such record as would be necessary so that the reviewing court could determine whether or not the defendant has been afforded a fair and impartial trial before a fair and impartial tribunal. Quoting from the court's opinion at page 533:

> "We would not hold that a frivolous and unsupported claim of bias or preconceived judgment on the part of

> the judge or magistrate would ipso facto disqualify the judge, but we are unqualifiedly of the opinion that any one who asserts such a claim should be afforded an opportunity to support the claim by the introduction of testimony. While it would not be the duty of the judge to tamely submit to unfounded imputations upon his integrity, he should at least permit a record to be made, so that a reviewing court may determine whether or not there has been a trial before an impartial tribunal."

The Supreme Court of Oregon in *State* v. *Biggs* (1953), 198 Ore. 413, 255 P. 2d 1055, 1060, in holding unconstitutional under the 14th Amendment to the Constitution of the United States, the Oregon statute permitting change of venue only in felony cases, recognized that an entirely different situation would have been presented in that case had the trial court granted a hearing on the petition for change of venue from which a record could have been made, subject to review by the appellate court, but the denial without a hearing, based upon the aforementioned statute constituted violation of due process of law.

In 16A C.J.S. (Constitutional Law) Section 591, p. 1185, the rule is stated:

> "The process of law in a criminal case requires not only a trial or hearing before judgment and condemnation, but also a fair and impartial trial *or hearing* according to the due and orderly course of the law. • • • " (Our emphasis.)

In *State ex rel. Fox* v. *LaPorte Circuit Court* (1956), — Ind. —, 138 N.E. 2d 875, dissenting opinion by Justice Emmert, p. 884, approves the conducting by a court of a hearing, even though the Indiana statute permits only one change of venue from the county in a capital case, and

where the court found bias and prejudice existed, he would hold the Indiana statute unconstitutional as a denial of due process of law.

Courts by their very nature have the inherent power to do everything reasonable and necessary to carry out the purposes for which they are created, and must exercise every reasonable effort to protect the rights of an accused. *Knox County Council* v. *State ex rel. McCormick* (1940), 217 Ind. 493, 29 N.E. 2d 405, 407, 130 A.L.R. 1427.

Petitioner offered to prove the facts and allegations set forth in his motions for continuance and change of venue, and the State of Indiana at no time denying the facts and allegations as set forth in the motions, and the Court having heard no evidence, this Court must assume that the facts and allegations contained in the motions and offer to prove are true. *Lambert* v. *People* (1957), 355 U.S. 225, 78 S. Ct. 240, 242, 2 L. Ed. 2d 228.

V.

Trial Court's Refusal to Permit Petitioner to Introduce Evidence Including His Own Testimony in Support of His Offer to Prove the Involuntary Nature of a Purported Confession Prior to Its Introduction Into Evidence Denied Petitioner Rights Guaranteed Under the Due Process Clause of the 14th Amendment to the Constitution of the United States.

During the course of the proceedings, the following question was propounded by the prosecuting attorney to Dan Hudson, Chief of Detectives of the Evansville Police Department. Said question is as follows:

> "Q. What, if anything, did the defendant say to you about the murder of Whitney Wesley Kerr when he

talked with you on Tuesday, April 12, 1955?" (Tr. p. 1615).

Petitioner at the time duly and timely objected to said question (Tr. p. 1615). The objection to said question covers pages 1615 to 1623 of the transcript (Brief pages 60-67), and in substance is an objection based upon the illegal arrest of Petitioner; that he had been detained by police officers for an unreasonable time after his illegal arrest and before any purported confession, without being taken before any committing magistrate or hearing judge; that he was not advised of his right to remain silent; that he was questioned for long and prolonged periods of time; that upon arresting Petitioner police officers held the defendant incognito for a period of seven days, submitting him to relentless questioning; that he was denied proper sleep and rest, and was not provided with proper food; that the purported admission or confession, if any, was illegally and unlawfully obtained by force and violence, and in violation of Petitioner's rights as guaranteed by the Constitution and laws of the State of Indiana, and by the due process clause of the 14th Amendment to the United States Constitution, and in addition to alleging the facts and circumstances surrounding the coerced nature of any purported admission or confession, the Petitioner asked leave of court to introduce evidence in support of said objection, and offered to prove facts and circumstances set out in said objection (Tr. p. 1623).

Thereafter the court overruled said objection and denied Petitioner the opportunity or right to introduce evidence in support of his objection (Tr. p. 1623).

The witness, Dan Hudson, was then permitted to answer said question, which answer was as follows:

"A. He told me that he had shot and killed Wesley Kerr" (Tr. p. 1623).

By reason of the ruling of the trial court, Petitioner herein was denied the right to call witnesses in his own behalf and to introduce evidence as to the involuntary nature of any purported confession. That said ruling and procedure of the court was in direct violation of the due process clause of the 14th Amendment to the Constitution of the United States.

The constitutional right afforded to a defendant in a criminal proceeding means the right to be heard at the proper time, and is not satisfied by so postponing the right as to make it in whole or in part ineffective or to a time when to avail of it entails the acceptance of conditions which may not lawfully be imposed upon an accused. Denying Petitioner the right to introduce evidence and produce witnesses at the time of the objection constituted a violation of due process. *In Re: Murchison* (1955), 349 U.S. 133, 75 S. Ct. 623, 625, 99 L. Ed. 942; *English* v. *State* (1949), 206 Miss. 170, 30 So. 2d 876, 877.

A confession based in whole or in part upon a confession obtained under circumstances as set forth in Petitioner's objection and offer to prove (Tr. pp. 1615-1623) violates due process. It is not necessary to determine whether the other evidence in the record is sufficient to justify the conviction. That the admissions and confessions were illegally and unlawfully obtained prevent the use thereof in a state court proceeding. *Watts* v. *Indiana* (1949), 338 U.S. 49, 69 S. Ct. 1347, 93 L. Ed. 1801; *Malinski* v. *New York* (1945), 324 U.S. 401, 65 S. Ct. 781, 783, 89 L. Ed. 1029; *Williams* v. *North Carolina* (1942), 317 U.S. 287, 63 S. Ct. 207, 208, 87 L. Ed. 279.

The court's ruling in Petitioner's case clearly violated his constitutional rights and was, to say the least, inconsistent, for during the course of the proceedings at tran-

script page 1296, the following question was asked officer Dan Hudson by the State:

"Q. What did Leslie Irvin say to you on or about April 8 at the time you have just testified, regarding the homicide of Wesley Kerr?"

The Petitioner filed an objection to said question, made an offer to prove, and the court heard evidence relating to the voluntary or involuntary nature of a purported admission or confession made at said time, if any, and the circumstances under which said statement was obtained. Thereafter the court overruled said objection and the witness was permitted to answer the above question:

"A. On April 8 he denied killing Wesley Kerr" (Tr. p. 1614).

It is impossible to conceive of any situation where the circumstances and conditions surrounding the taking of a purported confession would be the same on April 12 as they had been 5 days prior thereto, on April 8. See 16A, C.J.S. (Constitutional Law) Sections 579, 591.

In the case of *U. S.* v. *Carignan* (1951), 342 U.S. 36, 72 S. Ct. 97, 96 L. Ed. 48, the question was presented wherein the court erred in refusing to permit the respondent to take the stand and testify in the absence of the jury to facts believed to indicate the involuntary character of his confession. In this particular case the Government made no objection to the reversal of the conviction on that ground, and this Court stated:

"We think it clear that this defendant was entitled to such an opportunity to testify. An involuntary confession is inadmissible. Such evidence would be pertinent to the inquiry on admissibility and might be

material and determinative. The refusal to admit the testimony was reversible error."

In the instant case the Petitioner was denied the right to testify for and on behalf of himself, and to call witnesses to support his offer to prove, all of which would be in violation of his constitutional rights.

VI.

Permitting Prosecuting Attorney to Participate in the Voir Dire Examination of Prospective Jurors, in the Examination of Witnesses, to Testify as a Witness as to a Purported Confession and to Then Comment on His Own Testimony in the Closing Argument is Unethical, Morally Wrong and Violates Due Process.

Paul B. Wever at the time of trial was prosecuting attorney for the First Judicial Circuit of Indiana, which is Vanderburgh County, Indiana. This cause was venued to the nearby community of Gibson County, Indiana, where Mr. Wever was appointed as a special prosecuting attorney by Judge A. Dale Eby, Judge of the Gibson Circuit Court, for the purpose of prosecuting the case of State of Indiana versus the Appellant herein. Mr. Wever was acting in the many and varied phases of the proceedings in this case, commencing with the giving of news releases to the various news media, presenting facts to the grand jury upon which an indictment was returned in this cause, arraignment, etc. During the course of the voir dire examination of jurors, he participated in the examination of the prospective jurors, made objections to challenges for cause by the defendant-appellant herein and in the presence of the prospective jurors, argued on behalf of the State on questions of law. After the jury was selected, Mr.

Wever examined the witnesses during the course of the evidence as presented by the State of Indiana in its case in chief. Included in the State's case in chief was the testimony of the same Mr. Wever, who was sworn as a witness and testified concerning the purported oral confession made to him by this defendant-appellant. At the close of the evidence, and over defendant-appellant's objections, Prosecuting Attorney Wever was permitted to make a closing argument to the jury, and during the course of his closing argument he argued, and was permitted to argue in support of matters he himself had testified to under oath (Tr. p. 4773).

It was not surprising therefore, when this cause was argued before this Honorable Court on January 15, 1959, that the same Witness-Prosecuting Attorney was present in the chambers of this Honorable Court, and available to answer any questions by this Court.

Such conduct on the part of a prosecuting attorney is, on its face, offensive to the rights of a defendant to a fair and impartial trial. It permits the prosecuting attorney, as a key factor in the trial of a criminal cause, and the director of the introduction of evidence, through his actions in the trial, towards witnesses, other participants in the trial, towards the jurors themselves, to gain the confidence of the jury as no other witness could achieve or even have the opportunity of achieving. Mr. Wever, as prosecuting attorney, was and is an advocate. A witness belongs to no one. He should stand impartial before the bar of justice, ready to testify as to the facts for which he is called to testify as a witness. Mr. Wever, as prosecuting attorney, was obviously prejudiced against the defendant-appellant, and vitally interested in obtaining a conviction against him. It cannot be questioned that his testimony, or actions as prosecuting attorney were influenced by his desire to obtain a conviction.

Canon 19 of the Canons of Professional Ethics of the American Bar Association clearly defines the duties owed by an attorney to the parties and to the court, where circumstances arise which require the attorney to become a witness on behalf of his client. Canon 19 provides:

"19. APPEARANCE OF LAWYER AS WITNESS FOR HIS CLIENT

"When a lawyer is a witness for his client, except as to merely formal matters, such as the attestation or custody of an instrument and the like, he should leave the trial of the case to other counsel: Except when essential to the ends of justice, a lawyer should avoid testifying in court in behalf of his client."

This Court, as well as other courts, has recognized that a prosecuting attorney carries greater weight with a jury than other attorneys or witnesses. *In re: Sawyer* (1959), 360 U.S. 622, 667, 79 S. Ct. 1376, 1398, 3 L. Ed. 2d 1473; *Robinson* v. *U. S.* (CCA 8th 1929), 32 F. 2d 505, 510.

In *Robinson* v. *U. S., supra,* at page 510, the Court had this to say:

"The function of a prosecuting attorney and a witness should be disassociated. A jury naturally gives to the evidence of the prosecuting attorney far greater weight than to the ordinary witness. • • • The tendency of a situation where a prosecutor in a criminal case becomes a witness for the government is to prevent somewhat that fair trial to which a defendant is entitled."

This is likewise the rule in certain state courts in criminal cases. *State* v. *Ryan,* 1933, 137 Kan. 733, 22 P. 2d 418; *Frank* v. *State,* 150 Neb. 745, 35 N.W. 2d 816.

Ethics has been defined as the "philosophy of morals . . . the standard of character set up by any race or nation."

The American Bar Association, in adopting its Canons of Ethics has set forth a standard of conduct expected of all attorneys, regardless of the type of cause advocated. In establishing a moral code, the American Bar Association has determined the right and wrong of an attorney's conduct. By those canons, it has designated Mr. Wever's conduct in the within cause as being unethical. The majority opinion of the Court of Appeals on remandment from this Court stated:

> " . . . In a forum where the ethics of Wever's conduct is directly brought in issue by the State of Indiana, it is apparent that a charge of unethical conduct on the foregoing facts would be serious. However, in this case we cannot adjudicate a question of ethics . . . It is . . . reasonable to conlude that the jurors would react against the State in view of such conduct by its legal representative. However that may be, the most that can be said is that this conduct was error, but did not have such a substantial effect upon the outcome as to strip the trial of due process" (Tr. pp. 50-51).

And Judge Duffy, in his dissenting opinion, commented:

> "Another reason for the failure of due process in the instant case is that one of the two state prosecuting attorneys who tried the case was acting as a witness on the trial . . . Such conduct was in violation of Canon 19 of the Canons of Professional Ethics. Such conduct was offensive to the rights of the defendant to a fair and impartial trial" (Tr. p. 53).

In the light of the Court of Appeals recognition of the serious breach of ethics by Mr. Wever's participation in this cause as hereinabove set out, which conduct the majority opinion admits to be "serious", if an action had been commenced against Mr. Wever by the "State", certainly

this defendant-appellant has established that Mr. Wever's conduct deprived him of a fair and impartial trial.

This Court in *Berger* v. *U. S.* (1935), 295 U.S. 78, 55 S. Ct. 629, 633, 79 L. Ed. 1314, in commenting upon the role of the prosecuting attorney and the weight afforded his conduct by jurors in a criminal prosecution states:

> "The United States Attorney (or other prosecuting official) is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the two-fold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one. * * *
>
> "*It is fair to say that the average jury in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations, and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none.*"

Even greater error is committed when the prosecutor is permitted to comment on his own testimony, re-testifying to things he had already testified to during the regular order of introduction of evidence during the trial. The

court would rightly refuse to permit either party to recall a witness who had already testified for the purpose of again letting the witness testify to the facts which he had previously testified under oath.

To be consistent it is submitted that a prosecutor-witness should not be given any more or greater rights, privileges or latitude than any other witness. Without a doubt no witness should be permitted to argue to the jury concerning testimony elicited from him while a witness for either party, and under such circumstances the opposing party is denied the right of cross examination, and both parties having rested, there is no way the opposing party can rebut the impression or otherwise contradict or counteract the additional evidence and testimony which the witness presents thereby in his argument to the jury.

It was obvious that Prosecutor Wever was using his position as a prosecuting attorney in this case to an unfair advantage. Why else would Prosecutor Wever, in a sample quote from his argument, state:

> "I testified myself what was told me" (Tr. p. 4773).

Denial of the right to cross examine witnesses amounts to a violation of due process of law. *Alford* v. *U. S.* (1931), 282 U.S. 687, 51 S. Ct. 218, 75 L. Ed. 624, 627.

See also *Armes* v. *Pierce Governor Co.* (1951), 121 Ind. App. 560, 101 N.E. 2d 199, 203:

> "The right to cross-examine witnesses under oath is not a rule of procedure or evidence. It is fundamental to due process, and cannot, unless waived, be denied by any trier of facts, any court, or administrative tribunal."

Defendant-appellant sincerely contends that Mr. Wever's conduct unquestionably violated Canon 19; that no action

by any bar group or court at this late date would in any way change the prejudicial effect which deprived this defendant-appellant of a fair and impartial trial. No action has ever been taken against Mr. Wever, nor has he been prejudiced in any way, as he moves from the office of prosecuting attorney to candidate for Circuit Judge.

This Court posed the following question with regard to the conduct of the prosecuting attorney in *In re*: *Sawyer* (1959), 360 U.S. 622, 79 S. Ct. 1376, 1398, 3 L. Ed. 2d 1473:

> "If the prosecutor in this case had felt hampered by some of the rulings of the trial judge, and had assailed the judge for such rulings at a mass meeting, and a conviction had followed, and that prosecutor had been disciplined for such conduct according to orderly procedure for such disciplinary action, is it thinkable that this Court would have found that such conduct by the prosecutor was a constitutionally protected exercise of his freedom of speech, or, indeed, would have allowed the conviction to stand?"

Would the answer be any different if the prosecutor's conduct is in the court room, in the presence of the Judge and jury, where he stands as an official of the court, violating the very canons which he agrees to abide by when he enters into the practice of the legal profession? This Court should refuse to affirm this conviction, based upon the conduct of Mr. Wever.

VII.

Denial of Opportunity to Prove Actual Bias Upon Part of Certain Jurors Denied Petitioner a Fair Trial.

Petitioner challenged certain jurors for cause and made offers to prove that said jurors were biased against Petitioner, and that permitting them to serve under such circumstances would prevent the Petitioner from having a fair and impartial trial as guaranteed by the due process clause of the 14th Amendment to the Constitution of the United States.

For this reason, Juror William Hensley was challenged for cause: Petitioner's offer to prove appears in the transcript at pages 3848-3849, and reads as follows, to wit:

> "The defendant challenged the juror for cause, the cause being that the juror shows by these answers and previous answers that he has a fixed and settled opinion as to the guilt of the defendant as to most of the facts and circumstances necessarily relied upon for a conviction by the State of Indiana; that said juror would not be an impartial juror as required by Article 1, Section 13, of the Constitution of the State of Indiana; to permit said juror to sit in this cause would be in violation of the defendant's rights as to Article 14 of the Federal Constitution of the United States; that the defendant further for his challenge states that said juror has an opinion as to the defendant's guilt as to the other offenses in the State of Kentucky charged, all of which the defendant now offers to prove."

The court overruled said challenge and offer to prove, denying Petitioner the opportunity to introduce evidence in support of said challenge (Tr. p. 3849).

For the above reason, Juror Jasper Johnson was also challenged for cause. Petitioner's offer to prove appears in the transcript at pages 3851-3852, and reads as follows, to wit:

> "The defendant at this time challenges the juror for cause, the cause being that said juror shows by his answers now given and heretofore given that he has a fixed and settled opinion as to the guilt of the defendant as to most of the facts and circumstances necessarily relied upon for a conviction of this defendant by the State of Indiana; that said juror would not be an impartial juror as required by Article 1, Section 13, of the Constitution of Indiana, and to permit said juror to sit would be in violation of the defendant's rights under the 14th Amendment of the Federal Constitution of the United States, the same being the due process clause; and that said juror has an implied bias and prejudice against the defendant; that the defendant further challenges for cause that said juror has read of other similar offenses and has a fixed opinion against the defendant as to his guilt regarding the same, all of which the defendant now offers to prove."

The court overruled said challenge and offer to prove, denying Petitioner the opportunity to introduce evidence in support of said challenge (Tr. p. 3852).

For the above reason, Juror Phillip Montgomery was likewise challenged for cause. Petitioner's offer to prove appears in the transcript at pages 3854-3855, and reads as follows, to wit:

> "The defendant challenges the juror for cause, the cause being that the said juror has read and heard of other offenses alleged to have been committed by this defendant, murder offenses, in the State of Kentucky,

and that said matters would be prejudicial against this defendant and for the reason of the same said juror would not be an impartial juror in this matter against this defendant, as provided by Article 1, Section 13, of the Indiana Constitution; and that to permit said juror to sit would be in violation of the defendant's rights under the 14th Amendment of the Federal Constitution of the United States, the same being the due process clause. The defendant further states and offers to prove at this time that said juror has an opinion as to the defendant's guilt of the crimes alleged to have been committed by this defendant in the State of Kentucky."

The court overruled said Challenge and offer to prove, denying Petitioner the opportunity to introduce evidence in support of said challenge (Tr. p. 3856).

For said reason, Juror Donald Higginbotham was also challenged for cause. Defendant-appellant's offer to prove appears in the transcript at page 3844, and reads as follows, to wit:

"The defendant challenges the juror for cause, the cause being that the juror shows by his answers that he has a fixed opinion as to the guilt of the defendant as to most of the facts and circumstances necessarily relied upon by the State for a conviction; that said juror would not be an impartial juror as required by Article 1, Section 13 of the Constitution of the State of Indiana; and to permit said juror to sit would be in violation of the defendant's rights as to the 14th Amendment to the Federal Constitution of the United States as to due process, and defendant at this time offers to prove that the juror has an opinion as to the

> defendant's guilt of other same and similar offenses, at which time the defendant offers to prove."

The court overruled said challenge and offer to prove, denying defendant-appellant the opportunity to introduce evidence in support of said challenge (Tr. p. 3845).

Due process requires that an accused be given a public trial after reasonable notice of the charges; that the defendant have the right to examine witnesses appearing against him; that he be represented by competent counsel and that he be afforded the right to call witnesses in his own behalf. *In re: Oliver* (1948), 333 U.S. 257, 68 S. Ct. 499, 507; 92 L. Ed. 682.

It is petitioner's contention that as with his arguments in support of motions for change of venue and continuance, that the guarantee of the right to an impartial jury is of little value if this Petitioner is denied the right to prove actual bias and prejudice upon the part of certain jurors. This Court, held in *Dennis* v. *U. S.* (1950), 339 U.S. 162, 171, 172, 70 S. Ct. 519, 521, 523, and at 525, where Justice Minton stated:

> "Preservation of the opportunity to prove actual bias is a guarantee of a defendant's right to an impartial jury."

This Court must assume that the offers to prove certain jurors biased were true, in that the Petitioner's offers to prove were denied, and Petitioner was not permitted to introduce evidence in support thereof, and the State of Indiana introduced no evidence, and did not offer to deny or contradict the evidence in Petitioner's offer to prove. *Lambert* v. *People* (1957), 335 U.S. 225, 78 S. Ct. 240, 242, 2 L. Ed. 2d 228.

Conclusion

Petitioner-appellant respectfully submits that the evidence at Petitioner's habeas corpus hearing clearly shows that he is being illegally and unlawfully restrained of his liberty as a result of a conviction in the Gibson Circuit Court of Gibson County, Indiana, where he was denied a fair and impartial trial, and which trial resulted in a conviction of murder and a sentence of death; that he was denied due process of law as guaranteed by the 14th Amendment to the Constitution of the United States, as evidenced by the questions presented by this brief, and supported by the dissenting opinion of Justice Duffy of the United States Court of Appeals for the Seventh Circuit.

Petitioner respectfully urges that for the reasons set forth herein this cause should be reversed by this Honorable Court.

Respectfully submitted,

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Order Granting Certiorari

SUPREME COURT OF THE UNITED STATES

No. 650 Misc.

OCTOBER TERM, 1959

LESLIE IRVIN, Petitioner,

—vs.—

A. E. DOWD, Warden.

On petition for writ of certiorari to the United States Court of Appeals for the Seventh Circuit.

Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari—February 23, 1960.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 722.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.